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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:

UNITED STATES OF AMERICA

CR-13-607

-against- :

United States Courthouse  
Central Islip, New York

PHILLIP A. KENNER and  
TOMMY C. CONSTANTINE,

Defendants. :

June 18, 2015  
9:30 a.m.

- - - - - X

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

For the Government:

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For Mr. Kenner

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For the Defendants:

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Proceedings recorded by mechanical stenography.  
Transcript produced by computer.

Mary Ann Steiger, CSR  
Official Court Reporter

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1 THE CLERK: All rise.

2 THE COURT: Please be seated.

3 (Case called, appearances noted.)

4 THE COURT: Are we ready to go?

5 MR. HALEY: Yes, sir.

6 THE COURT: Mr. Kenner, you can come up to the  
7 witness stand. We will bring in the jury.

8 THE CLERK: All rise.

9 (The jury is present.)

10 THE COURT: Please be seated.

11 Good morning, members of the jury.

12 ALL JURORS: Good morning.

13 THE COURT: Welcome back.

14 As you know, when we ended yesterday, Mr. Kenner  
15 was on direct examination by Mr. Haley so we will continue  
16 from that point.

17 Mr. Kenner, I'll remind you that you're still  
18 under oath; do you understand?

19 THE WITNESS: Yes, sir.

20

21 PHIL ANDREW KENNER,

22 called as a witness, having been previously  
23 duly sworn, was examined and testified further  
24 as follows:

25

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1 THE COURT: Go ahead, Mr. Haley.

2 MR. HALEY: Thank you, Judge.

3

4 DIRECT EXAMINATION

5 BY MR. HALEY:

6 Q. Phil, I believe we concluded yesterday as I was  
7 asking you questions concerning Owen Nolan, his testimony  
8 and his knowledge of the lines of credit and what was  
9 occurring or had occurred in the lines of credit.

10 Is that where we finished? Do you remember?

11 A. Yes, sir.

12 Q. Now, I'm going to ask you to take a look at two  
13 documents, 202 and 213.

14 (Exhibit handed.)

15 A. Yes, sir.

16 Q. Do you recognize those documents?

17 A. Yes, I do.

18 Q. What are they?

19 A. Kenner Exhibit 202 is a text message I received from  
20 Owen Nolan on December 23rd, 2007, about 6:40 in the  
21 evening.

22 And Kenner Exhibit 213 is a series of four text  
23 messages I received from Owen Nolan, three of them on  
24 December 28, which would be five days later, and then the  
25 fourth text message was on December 29, 2007, which would

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1 have been six days later.

2 Q. How did you acquire those two documents, sir?

3 A. They were turned over by the U.S. Government to you  
4 in pretrial, and subsequently you turned them over to me  
5 for review.

6 Q. Do those documents accurately depict a text message  
7 sent to you by Mr. Nolan on the dates and times indicated?

8 A. All five of them do, yes.

9 MR. HALEY: Your Honor, I offer those Kenner  
10 Exhibits 212 and 213.

11 MR. MISKIEWICZ: No objection.

12 MR. LARUSSO: No objection, your Honor.

13 THE COURT: 212 and 213 are admitted.

14 (Defense Exhibit Kenner 212 and 213 in  
15 evidence.)

16 BY MR. HALEY:

17 Q. Sir, with reference to 202, do you see a text message  
18 from Owen Nolan and it reads:

19 What R the papers for?

20 What was your understanding as to the question  
21 he was asking you with reference to that e-mail?

22 A. I had contact Mr. Nolan and told him that we needed  
23 to renew the line of credit for Northern Trust for the  
24 Hawaiian investment.

25 And I had asked him prior to this where he was

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1 so I could send, by Federal Express, the documents that  
2 Northern Trust bank wanted to wrap up with all of the line  
3 of credit lines before the end of the year if possible.

4 Q. Did that occur?

5 Did you send those documents via FedEx?

6 A. Yes, sir.

7 Q. Is there any documentation in your possession  
8 reflecting that Federal Express transfer?

9 A. Yes, sir.

10 Q. With reference to Kenner Exhibit 213, we have a  
11 series of text messages.

12 And as relates to the first text message bearing  
13 the designation 46, would you kindly explain your  
14 understanding of the request from Mr. Nolan as set forth  
15 in block 46?

16 A. After our communication on the 23rd, which was the  
17 previous exhibit, Mr. Nolan had returned back to his home  
18 in Toronto, Canada, where I sent the FedEx at the time,  
19 and he was asking me where the package was.

20 Apparently, he hadn't seen it when he returned  
21 back to his home yet.

22 He's also referring to the fact that at the end  
23 of the year we were wrapping up some tax business where he  
24 owed his sports agent, J.P. Barry, \$200,000 for his \$5  
25 million insurance settlement that I was handling the tax

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1 work on at the time.

2 He also wanted to know here we were going to get  
3 the \$200,000 from, as he references where are we gonna get  
4 that money since everything is tied up, because he knew  
5 his collateral at Northern Trust was pledged at the time,  
6 and he had already gone through and spent all of his  
7 liquid cash in the previous two years at that point.

8 Q. As relates to the next block, block 47, what was your  
9 understanding of the meaning of that?

10 A. Block 47 specifically refers to his agent payment to  
11 J.P. Barry of the \$200,000.

12 It was typical at the end of every calendar year  
13 for agents, sports agents, to put pressure on the players  
14 to send their final payments so they can get a tax  
15 write-off for that business expense.

16 Q. Going to block 48, when he says, call me, need to  
17 discuss this, what is the this, to the best of your  
18 understanding?

19 A. In block 48 that is referencing J.P. Barry.

20 And if you look at the two time stamps, you can  
21 see they're actually one minute apart.

22 So it was just a second thought I believe he had  
23 after he had sent regarding the business payment to J.P.  
24 Barry for 200,000.

25 Q. Finally, sir, block 49 is a reference to papers.

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1           What was your understanding as to what he meant  
2     by papers?

3     A.    Block 49 on the 29th, which was the day after we  
4     spoke on the phone regarding the block 46 text message, he  
5     said, can you call me back, I have a question about  
6     papers.

7           He was asking if we could have a follow-up  
8     conversation regarding the Northern Trust line of credit  
9     papers before he sent them back to Northern Trust via  
10    FedEx.

11    Q.    To the best of your memory, those questions posed by  
12    him to you, did they get -- was there some response by you  
13    in some form or fashion? And, if so, what form or  
14    fashion?

15    A.    After that text message in the afternoon on the 29th,  
16    excuse me, the morning of the 29th, Mr. Nolan and I spoke  
17    regarding the need to get the paperwork back to Northern  
18    Trust.

19           And we also spoke at length about the status of  
20    the Hawaii project and the milestone payments we were  
21    expecting to receive in short order from Alan Worden and  
22    Windwalker, the \$4 million we discussed yesterday.

23           And subsequent to the conversation with  
24    Mr. Nolan, he utilized my Federal Express account and  
25    signed and FedEx'd all the documents back to Northern



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1 Trust within 24 hours of that.

2 Q. Incidentally, do your fed -- do you have Federal  
3 Express records that have relevance to that mailing you  
4 just referred to?

5 A. Yes.

6 In fact, it's referenced on my American Express  
7 records that most of the line of credit holders at the  
8 time it references FedEx charges from me directly to each  
9 one of those clients, and then within five or six days it  
10 references each of those clients using my Federal Express  
11 account to send the paperwork after whatever discussions I  
12 had back to Northern Trust bank for each one of them,  
13 including Mr. Nolan.

14 Q. Now, Mr. Kenner, you were present when Glen Murray  
15 testified in this proceeding; is that correct?

16 A. Yes, sir.

17 Q. As relates to his testimony, sir, do you recall an  
18 instance where he was shown by the government his loan  
19 transaction history on direct examination of him?

20 A. Yes, I recall.

21 Q. And do you have a recollection that when shown his  
22 loan transaction history, his response, in substance, was  
23 this is the first time I became aware that my line of  
24 credit had actually been utilized or closed out.

25 I don't know, I don't want to put words in your

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1 mouth or repeat what he said, but do you have a  
2 recollection of what he said now?

3 A. Yes, I do.

4 Q. What is your recollection of what his testimony was?

5 A. At first, I believe Mr. Murray stated that in this  
6 courtroom, or shortly before his appearance here, was the  
7 first time that he had realized that his million dollars  
8 of collateral was seized by Northern Trust bank.

9 Q. Now, I'm going to show you exhibits 101 and 100 that  
10 were previously introduced into evidence.

11 (Exhibits handed.)

12 And perhaps you can follow it on the screen.

13 Mr. Kenner, given your background as a business  
14 manager for your clients and indeed a financial advisor,  
15 and we will talk about your qualifications a little later,  
16 but do you have an understanding as to what that document  
17 is, sir?

18 A. Yes, I do.

19 Q. What is it?

20 A. This was a monthly account statement for Mr. Murray  
21 from Northern Trust bank representing the time period,  
22 April 1st, 2009, to April 30, 2009, mailed to his home  
23 address in Manhattan Beach, California.

24 This would be representative of a statement that  
25 each one of the clients would have received on a monthly

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1 basis.

2 In addition, I would receive a copy of these  
3 statements as well at my home office.

4 Q. In or about April of 2009, to the best of your  
5 knowledge, where did Mr. Murray reside?

6 A. In Manhattan Beach, California.

7 Q. Now, take a look at page 2 of that exhibit.

8 Would you explain to us, sir, the meaning of the  
9 highlighted portion as relates to the numbers, not the  
10 date.

11 A. Okay.

12 First, in the bottom right of the statement  
13 where the chart is, you could see from March there was a  
14 large negative withdrawal in the account which was  
15 approximately the million dollars we had previously  
16 discussed -- excuse me -- Mr. Murray had discussed while  
17 he was on the stand.

18 Referencing the highlighted section under the  
19 change column it shows a change of negative \$495,000 which  
20 was the transfer that Mr. Murray made in the month  
21 following the seizure of the million dollars of collateral  
22 that he had pledged against his line of credit, leaving a  
23 value as of April 30, 2009, of \$2.18.

24 In order for the \$495,000 to be transferred out  
25 of that account, Mr. Murray had to be present during a

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1 conference call with not just Aaron Mascarella from  
2 Northern Trust bank, but also a representative from Schwab  
3 who had discussed the entire transaction with him so he  
4 could signoff on it.

5 Q. Now, I'm going to have you take a look at Kenner  
6 Exhibit 101.

7 And what does that document represent, sir?

8 A. This appears to be the Glen Murray Northern Trust  
9 statement for May 1st, 2009, to May 8, 2009, which would  
10 have been on or about the day Mr. Murray's account was  
11 closed at Northern Trust bank after the final transfer  
12 back to Charles Schwab for the remaining underlying  
13 securities.

14 Q. With reference to page 2 of that document, just  
15 interpret the meaning of the information on that page,  
16 sir, just interpret the meaning of the information.  
17 That's all I'm asking you.

18 A. Under the change column, the \$2.18 was the residual  
19 balance that was in the account after the \$495,000 was  
20 transferred back to Charles Schwab with the -- following  
21 the conference between Mr. Murray, Aaron Mascarella from  
22 Northern Trust bank, and the representative from Charles  
23 Schwab.

24 And thus on May 8 it shows a residual balance of  
25 zero dollars zeroing out the account and closing it at

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1 Northern Trust bank.

2 Q. Going to page 5 of that document, and particularly  
3 the two line items at the end, total disbursement and  
4 closing balance, would you kindly interpret those columns  
5 and figures for us?

6 Simply interpret what's on the document, sir, to  
7 the best of your knowledge.

8 A. I believe the total disbursement column shows the  
9 total amount of funds that had been liquidated out of  
10 Mr. Murray's account during the calendar year 2009, and  
11 closing balance of zero dollars at the end.

12 Q. In May of 2009, were you aware of any impediment as  
13 relates to any communication either Mr. Murray could have  
14 with you or you could have with him?

15 A. No, sir.

16 Q. From the point in time that Mr. Murray invested in  
17 the Hawaiian real estate project, and we all know what  
18 that is, and to whatever point in time the relationship at  
19 all between the two of you ceased, would you kindly  
20 describe to the jury the level of communication you and he  
21 would have?

22 A. By 2009, I was -- I had been -- I had known Glen  
23 Murray for approximately 18 years and our relationship  
24 continued up until the day before I was arrested on  
25 November 13, 2013.

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1           Our communication was very frequent. I would  
2       see Mr. Murray during that period of time anywhere from 6  
3       to 10 times a year face-to-face in whatever city he was in  
4       at the time, and I would speak to Mr. Murray on the phone  
5       no less than two to three times a month during that entire  
6       period of time.

7       Q.   How would you describe, sir, during that period of  
8       time and up until the point you were arrested, the nature  
9       of your relationship with Glen Murray?

10      A.   Very good.

11      Q.   Mr. Kenner, you are familiar, are you not, sir, with  
12      the allegations contained in the indictment for which you  
13      stand trial; is that true?

14      A.   Yes, sir.

15      Q.   I'm going to show you, sir --

16           THE COURT: Hold on one second. Before you put  
17      that up, why don't you approach.

18           (Continued on next page.)

19

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1 (The following takes place at sidebar.)

2 MS. KOMATIREDDY: Judge, there's the name issue.

3 MR. HALEY: I apologize. I didn't even think of  
4 that. I don't think it focused.

5 MR. MISKIEWICZ: But it's throughout.

6 MS. KOMATIREDDY: I can go through and redact a  
7 version over lunch or I could step out and do it now.

8 THE COURT: Can you read from it then without  
9 showing it?

10 MR. HALEY: Yes, I can do that.

11 MS. KOMATIREDDY: And I'll create a redacted  
12 version.

13 MR. HALEY: It was unintentionally.

14 THE COURT: All right.

15 (Continued on next page.)  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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1 (The following takes place in open court.)

2 BY MR. HALEY:

3 Q. Mr. Kenner, you testified that you're familiar with  
4 the content of the indictment; is that correct?

5 A. Yes, sir.

6 Q. I'm going to read, sir, portions of the indictment  
7 for purposes of simply an organizational presentation from  
8 my standpoint.

9 Are you okay with that?

10 A. Yes, sir.

11 Q. It begins, sir, by saying or reading:

12 The defendant, Phill A. Kenner, also known as  
13 Phil A. Kenner, meaning one L rather than two Ls, was a  
14 financial advisor whose clients included, among other  
15 individuals, current and former professional hockey  
16 players in the National Hockey League, (NHL) hereinafter  
17 the player/clients.

18 Is that allegation in the complaint true, sir?

19 A. Yes, sir.

20 Q. And could you give us some idea as to the  
21 professional hockey players that you were representing as  
22 a financial advisor over any period of time.

23 A. I started my business practice in sports and  
24 entertainment in or about 1992, in Boston, Massachusetts,  
25 and it was a concept that had not been started yet



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1 anywhere in the sports and entertainment arena.

2 And over the following 10 years, I built,  
3 through approximately 2002, 2003, perhaps the largest  
4 sports and entertainment business management practice in  
5 the world, peaking at about 135 sports and entertainment  
6 clients.

7 In 2003, after a dispute with my firm at the  
8 time, I filed a lawsuit against them to protect --

9 Q. Sir, my question was -- I am going to interrupt you,  
10 Mr. Kenner.

11 My question was, would you identify the hockey  
12 player clients that you represented. That's really my  
13 question.

14 A. Would you like the ones that are involved in this  
15 case?

16 Q. Yes.

17 A. I apologize.

18 Q. Let me be more specific.

19 As relates to the hockey player clients that you  
20 have represented, would you identify those that have  
21 relevance and materiality to these charges?

22 A. I apologize again. I misunderstood the question.

23 I believe so far we've, as witnesses in this  
24 case, we've seen Owen Nolan, Joe Juneau, Michael Peca,  
25 Bryan Berard, Jay McKee, Steve Ruchin, William Ranford,

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1 Tyson Nash, Darryl Sydor.

2 I'm not sure if that's a comprehensive list, but  
3 I believe that's most of them.

4 Q. Now the indictment, as you read, refers to John Does.

5 Are those individuals the John Does we're  
6 speaking of in the indictment, to your knowledge?

7 A. Yes, sir.

8 Q. Second paragraph reads:

9 That since approximately -- second sentence  
10 reads:

11 Since approximately mid-1990s, Kenner advised  
12 the player/clients on their financial affairs, managed  
13 their accounts at various financial institutions, and  
14 recommended various investments to them, including  
15 investments in real estate development projects and small  
16 privately held companies.

17 Is that sentence in sum and substance true,  
18 Mr. Kenner?

19 A. Yes, sir.

20 Q. In addition to advising them as relates to their  
21 financial affairs, did you also have a business manager  
22 relationship with your clients?

23 A. Yes, each one of them.

24 Q. Would you just give us a brief recitation of what you  
25 did as relates to your role as business manager?

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1 A. In general I operated a family office which would be  
2 understood in the financial community as someone who would  
3 manage the day-to-day business affairs of an individual or  
4 their family.

5 I would work on every financial aspect of their  
6 life, other than the sports agents who deal in negotiating  
7 contracts, so I would help them with the receipt of their  
8 funds, purchases of their homes, placement of their  
9 insurances, hiring of attorneys, finding investment  
10 managers for them, and dealing with any other  
11 financial-related aspect of their lives.

12 For some of the clients it got into the details  
13 of scheduling vacations for them, booking airplanes as we  
14 heard from Mr. Sydor, et cetera.

15 Q. What business relationship did you have with the  
16 player/clients, hockey player clients, in terms of  
17 compensation, sir?

18 A. From 2003 until the end of my engagement with each  
19 one of them, some of them right through November 13, 2013,  
20 I was compensated approximately one half of a percent of  
21 assets under management which would include all equity  
22 that I represented them on.

23 Q. Did you see introduced into evidence, sir, a document  
24 that reflected payments made to you pursuant to that  
25 business relationship?

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1 A. Yes, sir.

2 Q. And do you recall what client that referred to?

3 A. I believe we saw it for Joe Juneau, the Standard  
4 Advisors agreement.

5 Q. I'm talking, sir, about a statement introduced into  
6 evidence that reflected payments to you pursuant to that  
7 percentage arrangement as relates to their portfolio.

8 Do you remember seeing such a document like that  
9 in evidence? If not --

10 A. Not that I recall at the moment.

11 Q. With reference to the Standard Advisors agreement,  
12 who created that agreement?

13 A. My attorney at the time.

14 Q. And what was the purpose in having that agreement in  
15 place between you and your hockey player clients?

16 A. It was for the purpose of representing and defining  
17 the relationship between myself, my company and my  
18 individual clients.

19 Q. Did it address, sir, a circumstance should a dispute  
20 develop between you and your hockey player clients  
21 regarding, let's say, the management of their business  
22 affairs or even the role you performed as their financial  
23 advisor?

24 A. Yes, sir, there was.

25 Q. As relates to the hockey player clients that are

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1 relevant to this indictment, did one of them at a point in  
2 time exercise his rights under that Standard Advisor  
3 agreement in a litigation context?

4 A. Yes, sir.

5 Mr. Nolan initiated an arbitration in the State  
6 of Arizona in or about 2008.

7 Q. And he obtained, sir, did he not, a partial award  
8 from the arbitration panel as relates to the dispute  
9 between you and he; isn't that correct?

10 A. That is correct.

11 Q. And as a result of obtaining that partial award from  
12 the arbitration panel, do you recall whether or not he was  
13 awarded reasonable attorney's fees as well?

14 A. Yes, I believe he was.

15 Q. Now, without getting, sir, involved in any  
16 discussions from your perspective as to the merit of that  
17 award, does that award against you still remain  
18 outstanding?

19 A. Yes, it does.

20 Q. Meaning that you have not, to this day, made payment  
21 as relates to the monies that were acquired through that  
22 award; is that true?

23 A. That's correct.

24 Q. Next sentence in the superseding indictment reads:

25 Kenner was a licensed financial advisor between

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1 approximately July 1994 to November 2004.

2 Was that true or is that true?

3 A. That sounds correct.

4 Q. We heard testimony, sir, from an individual whose  
5 name escapes me right now, regarding your licensing,  
6 Series 7 licensing; is that correct?

7 A. Yes.

8 Mr. Melley referenced a Series 7, a Series 63  
9 and Series 65 license I held during that period of time.

10 Q. To your knowledge, was his testimony accurate in that  
11 respect; yes or no?

12 A. I believe it was.

13 Q. Next sentence reads:

14 Between approximately August 2002 and 2007,  
15 Kenner held the position of a secretary at Eufora  
16 (Eufora), an Arizona registered limited liability company  
17 that held itself out to be a seller of prepaid consumer  
18 debit cards.

19 Now, there's really two parts to that.

20 Were, or were you not, a secretary at Eufora  
21 during that period of time?

22 A. I believe I was a secretary at Eufora up until the  
23 beginning of 2005.

24 Q. When the indictment reads, an Arizona registered  
25 limited liability company that held itself out to be a

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1 seller of prepaid consumer debit cards; is that true?

2 A. I believe that is true.

3 Q. I'm going to move on, sir, to the next paragraph and  
4 I'm skipping a paragraph because I want to stay focused in  
5 connection with your testimony.

6 3. Between 2003 and 2005, the defendant,  
7 Kenner, created a series of Delaware limited liability  
8 companies for the purpose of purchasing real property in  
9 Hawaii, Kenner was the managing member of each entity,  
10 which included Little Isle IV, LLC, (Little Isle IV); Big  
11 Isle IV Ventures, LLC, (Big Isle IV); Big Isle V Ventures,  
12 LLC, (Big Isle V); Big Isle VI Ventures, LLC, (Big Isle  
13 VI); Kau Holding Company, LLC, (Kau Holding); and Ula  
14 Makika, LLC, (Ula Makika), collectively referred to herein  
15 as the holding companies.

16 Is that statement true or false?

17 A. That is true.

18 Q. Next sentence:

19 Several of Kenner's investment clients,  
20 including several of the player/clients, were members of  
21 Little Isle IV and invested money in Little Isle IV to be  
22 used to purchase real property; is that true?

23 A. That is correct.

24 Q. Sir, on page 3, there's a heading, the Hawaii land  
25 developments, and there are two paragraphs -- actually six

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1 paragraphs that follow.

2 And you're familiar with those allegations; is  
3 that correct?

4 A. Yes, sir.

5 Q. Let's talk, sir, about the Hawaii land developments.

6 I don't want to get involved in any repetition  
7 of testimony because I know yesterday you told us how you  
8 came to first meet John Kaiser in Hawaii with Chris  
9 Manfredi.

10 Do you recall that testimony?

11 A. Yes, I do.

12 Q. And I believe you told us about a meeting that took  
13 place in their hotel room at that time; is that correct?

14 A. Yes.

15 It was a cabana that they had rented.

16 Q. Could you, for purposes of clarity of the record,  
17 when did that occur, what time of the year, and what year,  
18 if you recall?

19 A. I believe it was in the middle of 2003.

20 Q. And in substance, sir, would you describe to the  
21 Court and jury what, if any, agreement was reached at that  
22 time following your meeting with Mr. Kaiser and  
23 Mr. Manfredi and yourself?

24 A. After viewing the property and meeting at their  
25 cabana that evening, they discussed doing a partnership



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1 with myself and any investor clients I had at the time for  
2 the first 258 acres which was the only land we had  
3 discussed at the time.

4 I believe the land was under contract by  
5 Mr. Kaiser and Mr. Manfredi individually for \$720,000 at  
6 the time.

7 I believe they had deposited \$10,000 on the land  
8 approximately a year earlier.

9 They let me know they were unable to come up  
10 with the residual balance and that the sugarcane company,  
11 the seller, was looking to close on the property in the  
12 subsequent four to six months, and they offered a 50  
13 percent stake in the project and they offered the balance  
14 payment at the time of closing, and they also had  
15 requested that when the time came to create vertical  
16 construction to build homes and infrastructure on the  
17 land, that I would also be the funding source for those  
18 construction dollars.

19 Q. Why you, Mr. Kenner? How did it come to be that you  
20 were meeting with them that day?

21 A. A mutual friend of ours named James Milana had  
22 introduced myself to Mr. Manfredi at the time and knew  
23 that I was in the business of real estate development  
24 through my dealings in Mexico, and Mr. Milana thought it  
25 would be a good meeting for us to have, so I took his

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1 advice and after one phone call I believe with  
2 Mr. Manfredi, I flew to Hawaii to have the meeting  
3 face-to-face and view the subjected property.

4 Q. Did that particular parcel of property have any  
5 specific names?

6 There's been a lot of names mentioned about the  
7 property in Hawaii.

8 A. Yes, sir.

9 It's been referred to as 258, which represented  
10 the number of acres that the property was, it's been  
11 referred to as Little Honu'Apo.

12 Q. I don't want to repeat evidence, sir, already viewed  
13 by the jury, but is there a photograph in evidence of that  
14 particular parcel that you saw?

15 A. Yes, sir.

16 Q. What then occurred, Mr. Kenner, as relates to a  
17 significant event with reference to the Hawaii land  
18 developments after that meeting?

19 A. Between that meeting and the end of December, I had  
20 spoken to both Mr. Juneau and Mr. Nolan about my trip to  
21 Hawaii.

22 Those were two individuals that I spoke to on a  
23 daily basis back in 2002-2003-2004 time frame, so both of  
24 them knew I was going over to look at some real estate and  
25 individually they were both very interested real estate

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1 buyers. Both of them had purchased on their own,  
2 independent from myself or any other clients, millions of  
3 dollars in personal real estate as well.

4 After the meeting with Mr. Kaiser and  
5 Mr. Manfredi, I did have subsequent conversations with  
6 Mr. Juneau and Mr. Nolan who agreed to be part of that  
7 land development purchase in Hawaii.

8 And we dealt with Northern Trust bank at that  
9 time to secure some lines of credit in order to put the  
10 collateral together to purchase the land before the end of  
11 calendar year in 2003.

12 Q. Well, you say some lines of credit.

13 Whose lines of credit?

14 A. Both Mr. Juneau and Mr. Nolan agreed to set up lines  
15 of credit to raise the capital necessary for the closing  
16 before the end of the year 2003.

17 Q. Were those pledged lines of credit?

18 A. Yes, sir, they were.

19 He transferred bonds that were held at Charles  
20 Schwab for each one of them to Northern Trust bank and  
21 went through a series of about five or six signings and  
22 transactions in order to facilitate the creation of the  
23 lines of credit through Northern Trust bank, and then have  
24 the collateral available to be transferred to the title  
25 company prior to closing at the end of December 2003.

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1 Q. Would you describe to us, sir, the substance of the  
2 conversations that you had with Mr. Juneau and Mr. Nolan  
3 in that regard with respect to the use of their lines of  
4 credit, the reason why he was being pledged a line of  
5 credit, the advantage or disadvantage of doing so, tell us  
6 what you're talking about.

7 A. It would have been similar to the conversations I had  
8 with each one of the individuals who set up lines of  
9 credit through 2005.

10 I effectively told them that with the purchase  
11 of the land, much like the other Mexican investments we  
12 did, we could simply invest cash into the property.

13 But one suggestion that had come out of the  
14 meeting I had with the president of Northern Trust bank in  
15 Arizona is he suggested if my clients had collateral, we  
16 could keep their bond accounts at Northern Trust bank  
17 under their management and create lines of credit using  
18 bonds as collateral.

19 The advantage to that, which I thought was a  
20 very good idea by Mr. Highmark at Northern Trust bank, was  
21 the individual bond accounts would then continue to  
22 receive 4 to 5 percent interest annually on their  
23 underlying securities while we utilized Northern Trust's  
24 loan capital for the investment in Hawaii.

25 Q. Now, Mr. Kenner, there's been testimony that with

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1 each one of your hockey player clients, your initial  
2 advice to them as relates to investments were investments  
3 in stocks and bonds.

4 Do you recall that kind of testimony?

5 A. Yes, sir.

6 Q. Was that testimony true, that initially when you  
7 began to represent those hockey player clients, it was  
8 investments of that nature; is that correct?

9 A. That is correct.

10 Q. How would you characterize those type of investments?

11 A. They would run the gamut from fairly safe in a cash  
12 or bond portfolio, to safe on the stock side, all the way  
13 up to very risky on the stock side.

14 Q. What would be the risky stock side exposure?

15 A. If we had an investment portfolio investing in  
16 Southeast Asian small cap stocks, they would be very  
17 volatile considering in a calendar year for that portion  
18 of the portfolio we could see as high as 50, 60 or 70  
19 percent return, but under normal historical returns we  
20 could also see a negative 30, 40, 50 percent return  
21 portion of that portfolio.

22 Q. Did you ever recommend those high risk type of stocks  
23 to your clients?

24 A. Yes, sir, as part and parcel to the overall  
25 portfolio.

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1 Q. Now, what about what is referenced here in the  
2 indictment in connection with investing in real estate,  
3 what advantages, disadvantages, risks, risk analysis are  
4 associated with those types of investments?

5 A. I believe the due diligence would be fairly similar  
6 to what I would do to look at the different stock  
7 portfolios around the world that I invested in for my  
8 clients over a 10-year period of time in 2002, 2003.

9 So when I would take a look at different real  
10 estate projects, I was looking for built-in value to see  
11 if we could buy land at far reduced rates to other  
12 appraised lands were in the relative areas.

13 Q. As relates to risk analysis versus return on the  
14 investment, could you give us some idea as to those  
15 issues?

16 A. As an example, just for the underlying land itself,  
17 over the three year period of time that we put some of the  
18 parcels of land in Hawaii under contract that we saw on  
19 the board when Mr. Manfredi was identifying the different  
20 major parcels, I believe the total land sale purchase  
21 contract values were about \$13 million.

22 And by the time we had secured the funding with  
23 Lehman Brothers in August 2006, which was effectively a  
24 little less than three years later, KPMG had appraised the  
25 land for around approximately \$100 million.

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1           So for an underlying value perspective, we had  
2           hit a home run as far as land values went. At that point  
3           we hadn't begun to even break-up the 6,000 acres of  
4           developable land.

5           Q. Well, sir, in connection with your conversations that  
6           you had with let's say Owen Nolan and Joe Juneau for  
7           purposes of the Hawaii land development, you said that you  
8           had similar conversations with all your clients that  
9           ultimately became investors in the Hawaiian real estate;  
10          is that correct?

11          A. That's correct.

12          Q. You just told us, as relates to real estate  
13          investments, did or did that not become part of your  
14          conversations with your clients when they questioned you  
15          about the advisability of the advice?

16          A. Absolutely.

17          Q. There's been testimony, sir, that at least from  
18          perhaps one witness that you gave assurances that the  
19          Hawaiian land investment project in terms of commitment of  
20          their lines of credit pledged collateral was without risk;  
21          is that true?

22          A. That never occurred.

23                   I recall Mr. Rucchin mentioning that the term  
24          risk-free was never used. I do recall that.

25          Q. Well, what, if any, conversation did you have with

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1 your hockey player clients concerning the risks associated  
2 with the investment in Hawaiian real estate and the  
3 potential for a great return if successful on that?

4 Do you understand my question?

5 A. No, if you don't mind rephrasing it please.

6 Q. All right.

7 Well, we go from stocks, as you told us a moment  
8 ago, stocks and bonds, when you initially were advising  
9 your clients; is that correct?

10 A. Yes, sir.

11 Q. To a point in time where you're beginning to discuss  
12 with them the Hawaiian real estate investment, correct?

13 A. Yes, sir.

14 Q. My question simply is this.

15 What, if any, discussion did you have with your  
16 hockey player clients concerning risks associated with  
17 investing in real estate and potential for profit, things  
18 of that nature?

19 A. As my client base had continued to become more well  
20 established financially, they had put together significant  
21 stock portfolios, and each of my clients at that point in  
22 time, with the growth in salary in the NHL, became more  
23 stable as far as their ability to invest in other asset  
24 classes which I would consider directly investing into one  
25 of those asset classes in addition to other private equity



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1 investments at the time.

2 As a result of their cash positions, based on  
3 their multimillion dollar a year contracts, we had risk  
4 discussion about filling out other asset classes at that  
5 point in time and real estate was one of them, including  
6 the Hawaii real estate venture.

7 Q. Why real estate?

8 A. There is a finite group of asset classes you can  
9 invest in, and real estate is one of the larger asset  
10 classes around the world that you can diversify your  
11 portfolio.

12 So by sometimes investing in what could be  
13 deemed a riskier investment, it actually lowers your  
14 exposure in your portfolio because of your diversification  
15 of asset classes.

16 Q. Does real estate have any particular value as an  
17 investment in terms of, let's say, return on the  
18 investment?

19 A. Yes, sir.

20 Much similar to as I described earlier,  
21 investing in Southeast Asian basket of stocks, you would  
22 see anywhere from a minus 50 percent to a plus 70 percent  
23 return, but it rounded out your portfolio of stock  
24 investments.

25 A real estate investment, if we had done our due

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1 diligence properly, which I believe we did as represented  
2 by the funding in 2006 by Lehman Brothers, we created an  
3 incredible intrinsic value to the underlying investors and  
4 that was approximately \$80-plus million of value by the  
5 time Lehman Brothers had done their analysis and brought  
6 in a development partner like Alan Worden and Windwalker.

7 Q. So staying, sir, with the initial investment by Joe  
8 Juneau and Owen Nolan, please continue with what happened  
9 chronologically as relates to their investments as we  
10 continue to discuss that aspect of the indictment that  
11 alleges the Hawaiian land developments as being part of a  
12 scheme to defraud. That's where I want to go, okay?

13 A. Okay.

14 After the close -- excuse me -- just prior to  
15 the close of the first 258 acres of Little Honu'apo in  
16 December 2003, a number of my other investors had become  
17 aware and clients had become aware that I was traveling to  
18 and from Hawaii quite often in the latter half of 2003 to  
19 prepare for the closing of that first parcel, and several  
20 of them had asked who was involved, if they could become  
21 involved, and to understand more about the real estate  
22 project.

23 At that point I believe I had spoken perhaps to  
24 Mattias Norstrom, perhaps Darryl Sydor, and perhaps one  
25 other client/investor who ultimately became an investor in

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1 the Hawaii project.

2 Prior to the closing in 2003, I believe each of  
3 them had initiated their investments in Hawaii by  
4 transferring \$100,000 to the Little Isle bank accounts on  
5 behalf of their investment, and each of them had begun the  
6 process of transferring bonds and setting up lines of  
7 credit for subsequent purchases in Hawaii.

8 In or around the time we closed on the 258  
9 acres, I was in Hawaii and I had spoken to some of the  
10 principals.

11 I believe Senator Avery Chumbley, who was the  
12 main principal in the sugarcane company, he had told me  
13 that they were selling off about 70,000 acres of land on  
14 the big island of Hawaii that their company had owned for  
15 approximately 150 years.

16 And I asked Mr. Chumbley if -- Senator Chumbley,  
17 if he would have somebody show me around the other parcels  
18 of land for sale at the time.

19 And on that trip I recall looking at the  
20 adjacent parcel to the 258 which Mr. Manfredi referred to  
21 as Honu'apo which was 1500 acre parcel of land.

22 I was also shown the Waikapuna parcel, 215 acres  
23 of land with about a mile and a half of coastline and its  
24 own private black and white sand beach, and we had looked  
25 at the parcel that Mr. Manfredi referenced as Honu'apo

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1 which was above the town of Pahala, which is about a 2100  
2 acre parcel.

3 After that visit I began discussing with Senator  
4 Chumbley and some of the other principals of the C. Brewer  
5 Sugarcane Company the ability to put those under  
6 agreement.

7 And at the time we were able to put the  
8 Waikapuna and the 1500 acres of Honu'apo and we began our  
9 lengthy due diligence process through 2004 and 2005 to get  
10 those two parcels closed.

11 Q. Mr. Kenner, as you engaged in all these efforts, were  
12 these efforts part of some scheme or artifice to defraud  
13 Joe Juneau or Owen Nolan?

14 A. No, sir.

15 Q. As you engaged in these efforts and further efforts  
16 as relates to the Hawaii land development, were they part  
17 of some scheme or artifice to defraud subsequent  
18 investors?

19 A. No, sir.

20 Q. There comes a point in time, does there not, sir, to  
21 move along in our timeline, Joe Juneau leaves the fold,  
22 for lack of a better term; is that true?

23 A. Yes, sir.

24 Q. Would you tell us, in a summary fashion, Mr. Kenner,  
25 what transpired as relates to Mr. Juneau, his decision in

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1 that regard, what happened, just tell us what happened?

2 A. Sure.

3 In or about 2004, Mr. Juneau called me and told  
4 me that he was going to retire from professional hockey.

5 And, at that time, he had invested in a series  
6 of private equity deals, real estate deals, in addition to  
7 stock and bond portfolios through me.

8 He told me that now that he was retired, he had  
9 become personally uncomfortable with the private equity  
10 deals because now that he was thinking about his finite  
11 hockey career, and his post-hockey career life, he asked  
12 me if he could get all of his money back from each and  
13 every one of the private real estate deals and other  
14 private equity deals at the time.

15 Q. The other private equity deal, as we know, was a  
16 percentage of ownership interest in Eufora; is that  
17 correct?

18 A. That is correct.

19 Q. So please continue.

20 What, in summary fashion, what then transpired  
21 as relates to investments that Joe Juneau had made in  
22 Hawaiian land development, then Eufora. Please continue.  
23 What occurred?

24 A. So in or about 2005, when these daily and weekly  
25 conversations were going on with Mr. Juneau, I told him I

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1 would do my best to find other investors to take him out  
2 of the private deals he requested to be out of.

3 I told Mr. Juneau he needed to be patient with  
4 me because it was an unusual request to say the least to  
5 ask for his money back.

6 So I contacted Mr. Constantine at Eufora and  
7 asked him if he knew of any other investors who may be  
8 interested in buying out Mr. Juneau's interest, which is  
9 \$100,000 at the time.

10 And Mr. Constantine told me he would make every  
11 effort to make that possible.

12 And sometime in 2005 we were able to return,  
13 shortly after Mr. Juneau's request, his \$100,000  
14 investment in Eufora and he no longer had an investment  
15 nor did he have any financial interest in the company.

16 With respect to the Hawaiian land project which  
17 Mr. Juneau had secured a partial interest in the \$500,000  
18 line of credit at the time which I believe was increased  
19 to somewhere in the neighborhood of 638,000 at one point  
20 in time, he had also requested that we close out that  
21 pledge so he could have that money free and clear if he so  
22 chose to take it back to Quebec, Canada, where he was  
23 moving upon retirement.

24 I told him to be patient, that as in 2005 and  
25 2006, we were working on larger funding deals which

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1 ultimately occurred with the introduction of Lehman  
2 Brothers and the inclusion of that \$500 million deal in  
3 August 2006, and in early 2007, when the dust settled from  
4 that deal, I had a conversation with Mr. Nolan at the time  
5 who was informed that Mr. Juneau wanted to be bought out  
6 of the deal and that his four percent interest in Eufora  
7 at the time would be available -- excuse me -- in the  
8 Hawaiian land project would be available to him if he  
9 bought him out.

10 Mr. Nolan agreed to do so, and at the time we  
11 covered Mr. Juneau's pledge with additional funds from  
12 Mr. Nolan's account at Northern Trust bank and Mr. Juneau  
13 was released from his pledge and released from his  
14 ownership in Little Isle.

15 Q. Why did you say it was highly unusual, sir?

16 A. If you could imagine for a moment you and I started a  
17 restaurant together and each put \$100,000 into it, and a  
18 year after the restaurant was up and running, I came to  
19 you and said, Mr. Haley, I no longer want to be a partner  
20 in this restaurant, can you give me my \$100,000 back.

21 You would say, well, I'm not sure we're going to  
22 get it because the money has been invested in the project  
23 and the business is up and running.

24 Q. As relates to the establishment, sir, of the Hawaiian  
25 land development projects, I read to you before a

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1 statement in the indictment regarding your position as  
2 managing member of various LLCs.

3 Do you recall that?

4 A. Yes, sir.

5 Q. What is an LLC?

6 A. A limited liability company established to protect  
7 the gross liability or risk factors of the underlying  
8 investors.

9 Q. Now, as managing member, who is then responsible for  
10 the operations of the LLC?

11 A. I was.

12 Q. And could you give us some idea as to the nature and  
13 extent of your responsibility as managing member of the  
14 LLC?

15 A. A managing member is identical to in operations as a  
16 president of a company as you would imagine.

17 So I was in charge of all of the operations of  
18 the company, the bank accounts of the company, the funding  
19 of the company, business and investment decisions of the  
20 company, securing employees, hiring and firing of  
21 employees, and in the daily welfare of business.

22 Q. You mentioned a moment ago the discussion you had  
23 with Owen Nolan concerning acquiring Joe Juneau's  
24 percentage interest.

25 Well, could you help us understand, Mr. Kenner,



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1 in return for the commitment that they were making either  
2 in cash or by giving their lines of credit as a  
3 commitment, how were they compensated? What were they  
4 getting for that?

5 A. They were getting an ownership interest in the Little  
6 Isle IV, LLC, which, after August 2006, became a rollup  
7 partner inside Na'alehu Ventures which was established to  
8 take all of the LLCs that I had created in 2003 to 2006 to  
9 hold the individual land parcels.

10 We put them altogether inside Na'alehu Ventures  
11 and then contributed that to the joint venture with  
12 Windwalker under the funding arrangements with Lehman  
13 Brothers.

14 Q. Perhaps it's obvious, but what advantage do they  
15 obtain by having an ownership interest in the LLCs that  
16 have title to Hawaii real estate?

17 A. There's several advantages in general.

18 One is if there were any issues or risk factors  
19 related to the investment in general, the individuals  
20 would be protected from that by what's known as the  
21 corporate veil, so other issues we had, outside people  
22 couldn't sue the individual members as opposed to owning  
23 these in your own individual names.

24 And, second, the purpose and intent of the  
25 investment was to capitalize on the upside growth of the

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1 real estate market certainly in the early 2000s and any  
2 return of capital from sales of subsequent deals our  
3 investors would end up receiving a percentage of the  
4 profits going forward.

5 Q. And as I understand, sir, the structure that the more  
6 you committed by way of cash or line of credit, the  
7 greater your percentage interest, correct?

8 A. That is correct.

9 Q. You said something a moment ago about the real estate  
10 market in early 2000.

11 A. Yes, sir.

12 Q. This goes back sometime, sir, but what was it like  
13 back then?

14 A. Well, in the early 2000s, and I guess it's easy to  
15 forget where we are today from where the real estate  
16 markets had been in 2008 and 2009, and we have fought hard  
17 to recover since.

18 But in the early 2000s, the real estate markets  
19 were very embryonic in their dynamic growth as evidenced  
20 by the fact that I was able to put the Waikapuna parcel,  
21 the 258 parcel, the 1500 acres in Honu'apo, and later the  
22 2100 acres at Moanalua under contract for about \$13  
23 million and by the time we got our funding deal done with  
24 Lehman Brothers just a few years later the land was  
25 appraised by KPMG for in the neighborhood of \$100 million.

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1 Q. Now, the establishment of Little Isle IV and other  
2 holding companies as set forth in the indictment involved  
3 various operating agreements; is that correct?

4 A. Each one of the LLCs was governed by their own  
5 operating agreement and each one of those were set up  
6 particularly to separate the individual land parcels so in  
7 the event there was an issue with any one of those  
8 individual land parcels, we wouldn't put at risk the rest  
9 of the land investments we had made. It's very normal  
10 standard approved business practice.

11 Q. That was not some part or artifice or scheme to  
12 defraud your hockey player clients in terms of  
13 establishing separate LLCs, was it sir?

14 A. Not at all.

15 Q. Let's move forward, Mr. Kenner, to your use and  
16 access of the various lines of credit by the specific  
17 hockey player clients identified in this indictment.

18 Would you tell us what transpired as relates to  
19 an individual's line of credit once he gave you the  
20 authority to access his line of credit as set forth in any  
21 number of documents, what occurred?

22 A. During the establishment of the line of credit,  
23 Northern Trust required that the individual client sign a  
24 letter that they had prepared which I think we have seen  
25 several of them in evidence, but they sent it to the

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1 clients directly and the clients sign and return it to  
2 them acknowledging I could access their lines of credit  
3 toward the business purpose of Little Isle IV.

4 Once those lines were open and established, each  
5 one of the individuals understood, through our  
6 discussions, that whatever amount of money they  
7 contributed and made available to the line of credit, they  
8 would be given a full capital account for them.

9 That meant if Mr. Peca contributed \$1.6 million  
10 through his line of credit, his ownership interest would  
11 be based on a \$1.6 million investment as if it was cash at  
12 any point in time.

13 So we, as the expenses of the company were  
14 incurred through architect fees, land planning fees, legal  
15 fees, archeology fees, travel and entertainment fees,  
16 payroll, et cetera, I would draw down on the different  
17 lines of credit on a monthly basis to cover the general  
18 expenses of the company.

19 And each of the investors, I would let them know  
20 what was going on as I would meet with them face-to-face  
21 and on a regular basis.

22 Q. Well, we have multiple lines of credit as has been  
23 established through testimony in this case; is that  
24 correct?

25 A. That is correct.

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1 Q. And they, as demonstrated by bank records, end up in  
2 bank accounts associated with Little Isle IV; is that  
3 true?

4 A. Yes, sir.

5 Q. When that happens, what's the nature of those monies  
6 that have been deposited in those accounts, how would you  
7 characterize that?

8 A. I would characterize them all as pooled funds for the  
9 benefit of the company.

10 Q. Well, sir, there's been testimony that with reference  
11 to those pooled funds, funds would be utilized from that  
12 pool, let's say, to pay the interest on someone else's  
13 line of credit.

14 Do you recall that?

15 A. Yes, sir, I do.

16 Q. And did that occur?

17 A. Yes, it did.

18 Q. And what is the purpose of doing that for purposes as  
19 relates to the general goal of achieving the objectives of  
20 the Little Isle IV investment, tell us about that, why did  
21 you do that?

22 A. Well, each of the investors understood that in order  
23 to create these lines of credit, they would continue to  
24 maintain their underlying bond portfolios.

25 So from two perspectives, as an example for

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1 Mr. Peca who had \$2 million in his bond portfolio, he  
2 would end up with \$100,000 of income out of that portfolio  
3 every year for the utilization of his bond portfolio's  
4 collateral to the line of credit.

5 Now in return for that, Mr. Peca, and all of the  
6 line of credit holders, were made aware that the company,  
7 Little Isle IV, would end up paying the monthly payments  
8 on their lines of credit as a general expense of Little  
9 Isle IV and the Hawaiian partners.

10 (Continued on next page.)  
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1 BY MR. HALEY (Cont'd):

2 Q. So all those charts showing the use of one person's  
3 line of credit, let's say to obtain interest on it would  
4 be the bond?

5 A. Interest on the line of credits.

6 Q. Interest on the line of credit for another hockey  
7 player client, was that part of some artifice or scheme to  
8 defraud, sir?

9 A. No, sir.

10 Q. Did there come a time, sir, that you personally paid  
11 interest on one or more lines of credit that we are  
12 referring to?

13 A. Yes, sir.

14 In May of 2009 -- excuse me -- in May of 2008,  
15 after Mr. Constantine and I had spent approximately 18  
16 months negotiating with Mr. Jowdy on terms of repayment of  
17 the open loan that he had with myself and the Hawaiian  
18 investors, Mr. Jowdy through his attorney Mr. Harvey  
19 terminated the negotiations with us and all of our  
20 partners at that point in time.

21 We had been extended about 18 months and about  
22 \$750,000 of additional interest payments during that  
23 period of time when Mr. Jowdy, through his lawyers, had  
24 continued to promise Mr. Constantine that he was going to  
25 settle with us.

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1           So starting in June of 2008 we still ended up  
2     with a \$40,000 a month line of credit payments that were  
3     due. From June of 2008 until December of 2008, I  
4     continued personally to make those payments for the lines  
5     of credit and I believe the total sum in the neighborhood  
6     of \$267,000, and that's when our discussions began with  
7     our need to sue Mr. Jowdy and make a decision with each of  
8     the line of credit holders on how we wanted to continue to  
9     either maintain those lines of credit at a cost to all of  
10    us as a group of \$500,000 a year or utilize that money to  
11    begin to sue Mr. Jowdy in the various jurisdictions that  
12    would allow us to try and recapture the money he owed us  
13    at the time.

14   Q.    So, sir, when you were at that point in time  
15   continuing payment on the interest on the lines of credit  
16   from your personal funds, was that part of some artifice  
17   or scheme to defraud your hockey player clients?

18   A.    No, sir.

19   Q.    Moving ahead, Mr. Kenner.

20           We know that Joe Juneau, as you testified, was  
21   ultimately paid back in full, sir, his investment in the  
22   Hawaii real estate project as well as Eufora.

23           Is that correct?

24   A.    Yes, sir, he was 100 percent paid back in both  
25   investments.



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1 Q. Is he listed as one of the victims in this  
2 indictment?

3 A. Yes, sir, he is.

4 Q. Now, after his departure, as we know from the  
5 evidence, other persons that testified in this trial  
6 became investors in the Hawaii real estate project, is  
7 that correct?

8 A. That's correct.

9 Q. The original operating agreement, as relates to  
10 Little Isle IV specified that the purpose of the LLC was  
11 to invest in Hawaiian real estate, did it not?

12 A. The 2003 operating agreement noted the purpose to  
13 invest in Hawaiian real estate.

14 That's correct.

15 Q. But there came a point in time, sir, as we know you  
16 have testified to and has been reduced in evidence in this  
17 court that money that was coming in to the Little Isle IV  
18 bank accounts or the other accounts, at some point in time  
19 was utilized for purposes of making a loan to Kenner  
20 Jowdy.

21 Correct?

22 A. That is correct.

23 Q. Tell us about how that decision was made and who was  
24 present when that decision was made, that is to say to not  
25 simply utilize the line of credit money for purposes of

**Kenner - Direct/Haley**

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1 Hawaiian real estate, but also then to use portions of  
2 that money to loan out to Mr. Jowdy.

3 What occurred?

4 A. In the middle of 2004, about six months after we had  
5 already closed on the 258 acres, we had a pending closing  
6 on both Waikapuna on the ocean and the Honu'Apo 1,500  
7 acres.

8 During that period of time we learned through  
9 our real estate attorneys at Carlsmith Ball, who was the  
10 largest law firm in Hawaii who we hired to handle the  
11 transaction, that our due diligence period prior to  
12 closing was going to take a significantly longer period of  
13 time than we had expected.

14 Through conversations I had with Chris Manfredi  
15 and John Kaiser at the time initially, we -- I told them  
16 that I had been requested by Mr. Jowdy who they were aware  
17 of as my Mexican real estate partner, to lend money to him  
18 on a short-term basis with a number of repayment plans  
19 that Mr. Jowdy had proposed to me.

20 They both thought that it was a good idea, and  
21 under Mr. Jowdy's proposal to pay us 15 percent interest  
22 on any money that we loaned to him, we thought it would be  
23 a good idea for cash that we had sitting around to do so.  
24 During that period of time, the summer of 2004, I began to  
25 speak with my other individual investors from Hawaii, many

## Kenner - Direct/Haley

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1 of which were the line of credit investors, and we  
2 discussed the proposal by Mr. Jowdy to borrow money from  
3 us at 15 percent.

4 Each one of them was in agreement that that  
5 would be a good idea, and specifically because each one of  
6 those line of credit holders were also investors in the  
7 first Diamante del Mar project with Mr. Jowdy, and  
8 subsequently the -- most of them were also investors in  
9 the Diamante Cabo San Lucas project.

10 I think perhaps as Mr. Peca had referenced we  
11 all kind of felt like a big family at that time. And by  
12 the end of the summer in 2004, John Kaiser and I signed a  
13 new operating agreement for Little Isle IV which  
14 specifically extended the purpose of the company to allow  
15 us to lend -- be a lender on behalf of the company.

16 So Mr. Kaiser and I signed a new operating  
17 agreement in or about September of 2004, and we began to  
18 lend money to Mr. Jowdy in or about November of 2004.

19 Q. What if any level of knowledge or awareness did the  
20 other members of Little Isle IV have as relates to the  
21 decision now to utilize sitting cash to loan to Jowdy?

22 A. Complete knowledge.

23 Q. And how did they acquire that?

24 A. It occurred at that time in two separate ways.

25 As I signed new operating agreements on behalf

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1 of the companies that I represented, I would disseminate  
2 or deliver those operating agreements to each of the  
3 individual investors when I would see them face to face  
4 and would leave them with a copy of the operating  
5 agreements, and during that period of time we discussed  
6 why there was a new operating agreement, other progresses  
7 in the Hawaii development project, and our intended desire  
8 to lend some short-term money to Mr. Jowdy and the terms  
9 of our agreement.

10 Q. Now, when that commenced --

11 MR. HALEY: Withdrawn.

12 BY MR. HALEY:

13 Q. By the way, Mr. Kaiser was part and parcel of that  
14 decision making process?

15 A. Yes, sir.

16 Q. Now, when that decision was made, sir, money began to  
17 then flow out of Little Isle IV accounts, accounts  
18 controlled by Little Isle IV or accounts in which lines of  
19 credit were being utilized to go to Mr. Jowdy as relates  
20 to this loan.

21 Is that true?

22 A. That is correct, in or about November 2004.

23 Q. Bank records reflect that, sir?

24 A. Yes, sir, they do.

25 Q. And as it began to go out, was there any repayment of

**Kenner - Direct/Haley**

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1 the interest or principal on that loan by Mr. Jowdy?

2 A. Yes.

3 On a regular basis, Mr. Jowdy would repay  
4 certain amounts of money to Little Isle IV and then  
5 subsequently to Ula Makika when that LLC was established.

6 Q. Did there come a time, sir, that the loan agreement  
7 involving these loans with Mr. Jowdy was reduced to a  
8 written document?

9 A. Yes, sir.

10 In fact, we began loaning money to Mr. Jowdy,  
11 which was intended to be a couple hundred thousand dollars  
12 pursuant to conversations I had with John Kaiser and some  
13 of the other investors through 2004.

14 By the end of November, Mr. Jowdy seemed to have  
15 in his plans a larger scale repayment opportunities to  
16 present itself to himself personally, so Mr. Jowdy asked  
17 if we would continue to extend loans to him in December  
18 and onwards. As I talked about that with Mr. Kaiser, he  
19 asked me, if we are going to extend the loans to Mr. Jowdy  
20 beyond a few hundred thousand dollars knowing we are all  
21 partners in the other projects, he recommended that we put  
22 a written agreement in place, which I did with Mr. Jowdy  
23 in early -- excuse me -- early December of 2004.

24 Q. Would you tell us when or where did that occur, who  
25 was present and describe to us how it came to be signed?

## Kenner - Direct/Haley

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1 A. In early December 2004 we had a hospitality event in  
2 Cabo San Lucas with a number of the investors that we were  
3 hoping to secure for our Cabo San Lucas project and it was  
4 a five-day event and about 125 people were coming.

5 So as a result I told Mr. Jowdy that John Kaiser  
6 had requested that we put the loan agreement to writing,  
7 and I told him I would bring a loan agreement with me to  
8 be signed while I was with him during that event.

9 On the Friday or Saturday night of that event, I  
10 traveled from my hotel to his house and presented the loan  
11 agreement to Mr. Jowdy. He was excited to see it because  
12 he knew it was going to afford him the opportunity to  
13 receive much more funds from us under the loan agreement  
14 and when Mr. Jowdy signed the agreement, we had our future  
15 golf pro, Mr. Robert Gaudet, was present, who I didn't  
16 really know much at the time, Mr. Jowdy had called him  
17 over to ask to deal with us and sign the document.

18 We signed the document and I left the home that  
19 night before the party began and returned to my hotel that  
20 night to drop off the document in my bag that I had  
21 carried the loan agreement with.

22 Q. Who retained the original of that document?

23 A. Mr. Jowdy did.

24 Q. So what did you leave with?

25 A. I left with a copy of the agreement.

**Kenner - Direct/Haley**

4292

1 Q. Mr. Kenner, I'm going to ask you to take a look at a  
2 document marked Kenner Exhibit 214.

3 Do you recognize that?

4 A. Yes, sir, I do.

5 Q. What is it?

6 A. This is the revolving line of credit loan agreement  
7 that I had -- I wrote and authored and memorialized the  
8 loan agreement with Mr. Jowdy and the Hawaii entities.

9 MR. MISKIEWICZ: The government stipulates to  
10 its admissibility.

11 MR. LARUSSO: No objection, your Honor.

12 THE COURT: What number is it?

13 MR. HALEY: 214.

14 THE COURT: 214 is admitted.

15 MR. HALEY: I was going to offer it at the  
16 conclusion of my client's testimony, Judge, but I'll take  
17 the government's offer at this point, Judge.

18 Thank you.

19 (Whereupon, Defense Exhibit Kenner 214 was  
20 received in evidence as of this date.)

21 THE COURT: Did you finish this topic,  
22 Mr. Haley?

23 MR. HALEY: The Hawaiian land development,  
24 Judge?

25 THE COURT: Just this particular area?

**Kenner - Direct/Haley**

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1 MR. HALEY: Yes, sir.

2 THE COURT: All right.

3 We'll take the morning break. Don't discuss the  
4 case.

5 (Jury leaves the courtroom.)

6 (Recess.)

7 (Continued on next page.)

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**Kenner - Direct/Haley**

4294

1 (Following a recess.)

2 THE COURT: Let's bring in the jury.

3 THE CLERK: All rise.

4 (Jury enters the courtroom.)

5 THE COURT: Everyone can be seated.

6 Go ahead, Mr. Haley.

7 MR. HALEY: Thank you, your Honor.

8 BY MR. HALEY:

9 Q. Now, Mr. Kenner, the Hawaii land development project  
10 commenced in 2003, correct?

11 A. Yes, sir.

12 Q. And then there came a point in time where for all  
13 intents and purposes activities ceased.

14 Is that true?

15 A. Yes.

16 In or about September 2008, when Lehman Brothers  
17 went bankrupt.

18 Q. Sir, I'm not going to ask you questions about what  
19 transpired in detail from 2003 to 2008 in terms of every  
20 transaction with reference to that project.

21 So let me get a little focused here, and I say  
22 that only for purposes of organization and so that we can  
23 address the issues that may be pertinent to the  
24 indictment.

25 MR. HALEY: Sorry to make a speech, Judge.

**Kenner - Direct/Haley**

4295

1 I'm trying to let the court and jury know why  
2 I'm jumping around a little bit.

3 BY MR. HALEY:

4 Q. Sir, did there come a point in time that a document  
5 which has been introduced into evidence as  
6 Government Exhibit 5104, known as a funding consulting  
7 agreement, was signed?

8 A. I believe there were two funding consulting  
9 agreements.

10 Q. That's correct.

11 And what were the two dates regarding both  
12 agreements, if you recall?

13 A. I believe the original 2004 agreement was dated in or  
14 about December of 2004, about the same time as the  
15 revolving line of credit with Mr. Jowdy.

16 And the second funding consulting agreement was  
17 in or about June of 2005.

18 Q. And would you explain to the court and jury the  
19 circumstances under which the funding consulting  
20 agreements came into existence.

21 A. Well, one of the things we discovered in Hawaii  
22 considering we were buying some very significant parcels  
23 of land was that the development of the infrastructure and  
24 vertical construction was going to become incredibly  
25 expensive, and far beyond the financial means of myself

## Kenner - Direct/Haley

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1 and my clients.

2 So I began to engage a number of outside  
3 individuals, including Mr. Constantine as referenced in  
4 those funding consulting agreements, to go source funds  
5 for both infrastructure development and vertical  
6 construction ultimately, and starting in about 2004,  
7 through other business dealings I had with Mr. Constantine  
8 and other individuals, we signed a number -- I signed a  
9 number of consulting agreements for people to help look  
10 for those lenders.

11 They actually became my only option after  
12 meeting with several banks, including the Bank of Hawaii  
13 in Hawaii who, frankly, were not interested in what they  
14 deemed angel investment or angel development money which  
15 is the very first infrastructure, when most banks told me  
16 in the state of Hawaii in particular was that at the point  
17 that I was able to get some hard money or money through  
18 lenders like the gentleman at Centrum and ultimately  
19 Mr. Constantine through the Urban Expansion loan, that the  
20 banks would be glad to come in after I began to spend  
21 other moneys on the property, take out the initial loans,  
22 like Lehman Brothers did, and then give us subsequent  
23 development money.

24 Q. Why Mr. Constantine, or what if any relationship did  
25 you have with Mr. Constantine at that point in time when

**Kenner - Direct/Haley**

4297

1 the funding consulting agreements came into existence?

2 A. That was near the beginning of my relationship with  
3 Mr. Constantine.

4 But what I recall at the moment in 2003 and 2004  
5 was that he was a very prominent businessman in Arizona,  
6 had been introduced to me by a mutual acquaintance in the  
7 sports and entertainment business who I respected quite a  
8 bit at the time.

9 And after several meetings with Mr. Constantine  
10 and some preliminary phone calls where he spoke to  
11 potential lenders, you know, I felt very comfortable that  
12 the initial, I believe it was \$10 million I was seeking  
13 for infrastructure development, it would be very  
14 attainable through Mr. Constantine and his extensive  
15 contacts.

16 Q. Was there any outward manifestations of his wealth at  
17 that time?

18 A. When I met him, I think either on the first or second  
19 meeting after lunch he took me on a tour of Scottsdale in  
20 one of his two helicopters.

21 I remember flying over his property at the time  
22 which was a 40-acre home site, I believe it was the second  
23 largest home site in Scottsdale, Arizona. It possessed  
24 I -- excuse me -- on the property, the 40-acre site, he  
25 had constructed which was very impressive an 8 to 10-foot

**Kenner - Direct/Haley**

4298

1 wall around 37 acres of the property.

2 On the property itself was the beginnings of a  
3 22,000 square foot facility and on the property itself  
4 there was I think what's called a shifter car track or a  
5 race car track which was what I learned later was one of  
6 the highest rated shifter car tracks in North America on  
7 his own personal property.

8 So it was very impressive, what I had seen at  
9 that time.

10 Q. Do you know if at the time he had a very competent  
11 land use attorney working for him?

12 A. What --

13 Q. Do you know if at the time he had a very competent  
14 land use attorney working for him?

15 MR. MISKIEWICZ: Objection to form.

16 THE COURT: Sustained as to form.

17 BY MR. HALEY:

18 Q. So continuing, sir, with the funding consulting  
19 agreement.

20 A. After I had spoken to Mr. Constantine about my land  
21 development in Hawaii, and also told him what I was doing  
22 in Mexico where he said he would put out some feelers as  
23 well, thought that would be a more difficult route for him  
24 at the time, again, Hawaii was a very sexy and appealing  
25 development area, certainly in the early 2000s.

**Kenner - Direct/Haley**

4299

1           So Mr. Constantine told me that he had done work  
2     in the past for others to raise money, and in the hard  
3     money arena you really have to spend an awful lot of time  
4     meeting with lenders, sharing development plans, much more  
5     intensive than you would during normal bank loan per se  
6     through Bank of Hawaii.

7           So Mr. Constantine told me that he had been  
8     burned by other people in the past who he had done  
9     extensive work for and at the 11th hour, the people he had  
10    attempted to raise money for just frankly chose to use  
11    somebody else who had perhaps found a better deal or a  
12    cheaper deal at the time.

13          So Mr. Constantine told me he'd love to help.  
14    He was very confident in his ability to go raise funding  
15    for me and for our project, but he told me that he  
16    wouldn't do it unless he had an agreement in place to  
17    guarantee that he would be receiving advance fees or  
18    guaranteed fees against potential payouts that he would  
19    receive upon final funding.

20   Q.    What is a hard money loan?

21   A.    A hard money loan is in simple terms would be much  
22   like dealing with a loan shark, but when you are in large  
23   land development deals, or you are seeking other  
24   construction money, a lot of times regular banks won't  
25   deal with you in the early funding phases.

**Kenner - Direct/Haley**

4300

1           So it's very common in the real estate world,  
2           certainly very common from my experience that you would go  
3           out and on a \$3 million loan you may pay anywhere from 2  
4           to 10 percentage points on the front end of that loan as a  
5           fee to the lender. You may pay anywhere from 8 to 15  
6           percent annual interest rate on the loan.

7           And when you pay the loan off at the end, you  
8           would also be subject to buyout fees at the end. So it's  
9           very, very expensive money, but it's a means to an end to  
10          get to a more conventional loan.

11          Q.    The terms and conditions of the funding consulting  
12          agreement, Mr. Kenner, it's in evidence. So I'm not going  
13          to have you recite the meaning of that document. The jury  
14          will have the opportunity to review it at the appropriate  
15          time.

16                But my question to you is this, sir, what if any  
17          discussions did you have with John Kaiser as relates to  
18          the funding consulting agreement?

19          A.    Prior to signing the funding consulting agreements,  
20          Mr. Kaiser and Mr. Manfredi were involved in all of the  
21          day-to-day operations that were going on in Hawaii and  
22          certainly they were primarily due diligence with  
23          archaeologists, infrastructure, engineers, land plan,  
24          surveyors, certainly our attorneys at Carlsmith Ball who  
25          were paid a lot of money for their work.

## Kenner - Direct/Haley

4301

1           They came to realize that when the time came for  
2 us to begin infrastructure, certainly on the original 258  
3 acres and subsequent 1,500 acres, we were going to have  
4 miles of infrastructure. So they knew that those funding  
5 requirements were far outside the scope of what myself and  
6 my investors could provide at the time.

7           After meetings with the local banks, they knew  
8 that we were going to have to find some outside sources.  
9 Mr. Manfredi had moved on a semi permanent -- into a  
10 semipermanent position in Hawaii and was living there  
11 probably 80 percent of the time and was charged by me with  
12 the responsibility of learning and understanding all of  
13 the due diligence and working with all of our on-site  
14 people, and Mr. Kaiser was doing his best to work with the  
15 land planning individuals to be prepared for  
16 infrastructure development.

17           So at that point in time, they understood we  
18 were going to have to go outside of our original  
19 partnership to begin this funding in a nonconventional  
20 way. They were very aware with where we were on the  
21 project, where we were on the timeline to close on the  
22 different parcels and what our capital requirements were  
23 going to be.

24 Q. With reference, sir, to the funding consulting  
25 agreement between Constantine -- Tommy Constantine and --



**Kenner - Direct/Haley**

4302

1 what was the entity?

2 Was it -- what entity was involved, sir, between  
3 I guess it was -- it was a funding consulting agreement  
4 between Little Isle IV, LLC, and Constantine Management  
5 Group, those were the cooperate entities.

6 Is that correct?

7 A. I believe that's correct.

8 Q. And the terms and conditions, sir, in these two  
9 documents, again, they speak for themselves.

10 But my question to you is this, who had the  
11 authority at that point in time to execute this document  
12 on behalf of Little Isle IV?

13 A. Only me.

14 Q. And there came a point in time that you executed this  
15 document.

16 Is that correct?

17 A. Yes, sir, several times.

18 Q. Well, two times as reflected in this exhibit, at two  
19 different occasions.

20 Is that correct?

21 A. That is correct.

22 Q. Now, in addition to your signature, there is a  
23 signature, sir, on both documents that says John Kaiser.

24 Is that correct?

25 A. Yes, sir.

**Kenner - Direct/Haley**

4303

1 Q. There?

2 A. Yes, sir.

3 Q. Did you forge his signature on those documents,  
4 Mr. Kenner?

5 A. No, sir.

6 Q. Well, it wasn't necessary for John Kaiser to sign  
7 either one of those documents by your own testimony,  
8 correct?

9 A. That is correct, it was unnecessary.

10 Q. So how was it that he came to sign the document?

11 Describe to the court and jury the circumstances  
12 under which that occurred.

13 A. Mr. Kaiser at that point in time when we were having  
14 the funding discussions and the need for infrastructure  
15 and development money, he told me that he wanted to be as  
16 involved as he possibly could be with all the decisions  
17 that were being made and wanted to be more involved in the  
18 papering of the detail itself.

19 I believe he felt at that point in time and  
20 expressed to me that Mr. Manfredi was carrying on a very  
21 significant day-to-day operational role, and was actually  
22 negotiating alongside me a lot of the different land sale  
23 contracts and purchases that we were doing, and I believe  
24 even in fact with respect to the discovery harbor lots and  
25 the Mark Twain lots that were discussed during earlier

**Kenner - Direct/Haley**

4304

1 testimony, Mr. Manfredi may have even signed the purchase  
2 contracts on those lots.

3 Q. Now, let's look specifically, sir, at this document.

4 Do you see your signature on the document?

5 A. Yes, sir, I do.

6 Q. Do you see the signature of Tommy Constantine on the  
7 document?

8 A. Yes, sir.

9 Q. It's dated 15 December '04, is that correct, near  
10 your signature?

11 A. Yes.

12 Q. And then it's dated 12/5/04 next to  
13 Tommy Constantine's signature.

14 Is that correct?

15 A. That is correct.

16 Q. It's dated 12/5/04 next to John Kaiser's signature?

17 A. 12/15/04.

18 Q. Excuse me, 12/15/04, is that correct?

19 A. Yes, sir.

20 Q. Did John Kaiser sign his name on 12/15/04 on that  
21 document?

22 A. No, sir, he did not.

23 Q. When did that happen?

24 A. Well, as I mentioned earlier there were two signings  
25 that actually occurred on each one of these documents.

## Kenner - Direct/Haley

4305

1           The original consulting agreement that  
2           Mr. Constantine had drafted for Little Isle to sign, he  
3           had signed it in or about December 15th of '04. He had  
4           called me to his office at the time which I picked up the  
5           document, told Mr. Kaiser I was going to visit with him in  
6           the state of Hawaii shortly thereafter, on one of our next  
7           due diligence trips.

8           And at that point in time I took the document  
9           with me to Hawaii and Mr. Kaiser and I both signed it the  
10          next time we were together, and I returned that original  
11          document back to Mr. Constantine I believe in early 2005.

12         Q. But even though it says 15 December '04, that's not  
13          the actual day that either you or John Kaiser signed the  
14          document or affixed the signature, is that your testimony?

15         A. That's correct. Above it there is a line that says  
16          effective this 15th day of December, 2004.

17                 So we signed the document and dated it according  
18          to the date on the agreement.

19         Q. With reference to the second funding consulting  
20          agreement, see the signature Phillip A. Kenner?

21         A. Yes, sir.

22         Q. Whose signature is that?

23         A. That is my signature.

24         Q. It says 1, June, 2005, is that correct?

25         A. Yes, sir, that's how I date most of my documents.

**Kenner - Direct/Haley**

4306

1 Q. John Kaiser, 6/1/05, is that correct?

2 A. Yes, sir.

3 Q. And Tommy Constantine 6/1/05, is that correct?

4 A. Yes, sir.

5 Q. When did Tommy Constantine affix his signature to  
6 this document?

7 A. The original document that Mr. Constantine provided  
8 for the '05 consulting agreement he signed on or about  
9 June 1st of 2005 and delivered the document to me in  
10 person in Scottsdale, Arizona.

11 And the same routine occurred. I took the  
12 document with me until the next time I saw Mr. Kaiser in  
13 Hawaii on one of our due diligence trips.

14 Q. Are you able, Mr. Kenner, to recollect the day that  
15 occurred?

16 A. No, I am not.

17 Q. Was the execution of the funding consulting agreement  
18 as represented by Government Exhibit 5104 part and parcel  
19 of an artifice or scheme to defraud your hockey player  
20 clients?

21 A. Neither of them were.

22 Q. And pursuant to the contractual obligations as set  
23 forth in that funding consulting agreement, moneys flowed  
24 to Tommy Constantine from accounts controlled by  
25 Little Isle IV.

**Kenner - Direct/Haley**

4307

1 Is that correct?

2 A. Yes, I believe which included transfers from Ula  
3 Makika as well.

4 Q. And those accounts, they were funded by moneys put  
5 into the project by your hockey player clients that have  
6 been identified.

7 Is that true?

8 A. I believe in addition to moneys that both John Kaiser  
9 and I also subsequently put into the project.

10 Q. There's been testimony, sir, about the Urban  
11 Expansion loan.

12 Do you recall that?

13 A. Yes, sir, I do.

14 Q. Tell us about the Urban Expansion loan, how it came  
15 into existence, what occurred?

16 A. In or about the summer of 2005, when Mr. Constantine  
17 was working on vertical construction and infrastructure  
18 development money which we were seeking in the  
19 neighborhood of \$15 to \$30 million at the time, and I was  
20 also negotiating in 2005 with Lehman Brothers to come in  
21 and become my funding source, which would have frankly  
22 taken Mr. Constantine's need out of the way.

23 By about early July 2005, to my surprise, I had  
24 struck a deal that seemed to be very favorable with  
25 Lehman Brothers to fund I believe somewhere in the

**Kenner - Direct/Haley**

4308

1 neighborhood of \$10 million -- \$20 million on the front  
2 end and then subsequent funding as the development in the  
3 infrastructure was put in place. Within about 30 days  
4 during the final legal preparation for that loan to be  
5 signed, Lehman Brothers changed their deal requirements  
6 with me significantly.

7 At that point in time, I was in a very  
8 precarious position because I had already closed on the  
9 258 acres parcel in December of '03. I believe we closed  
10 on the 1,500 acre Hanu'Apo parcel in December of 2004, and  
11 we had a summer closing which was I believe end of July on  
12 the Waikapuna parcel.

13 Now, the Waikapuna parcel became the most  
14 important for me and for our group with respect to getting  
15 traditional bank lending as represented to me by the Bank  
16 of Hawaii and other Hawaiian banks, primarily because the  
17 258 acres and the 1,500 acres, although they had  
18 magnificent coastal views as we have seen from some of the  
19 photos, we did not have beach access.

20 The Waikapuna parcel had a mile and a half beach  
21 frontage in the state of Hawaii which was a remarkable  
22 piece of land to have under contract. Prior to the  
23 closing with Lehman Brothers, the proposed closing, I  
24 believe we had the Waikapuna parcel appraised by KPMG and  
25 they appraised it I believe for \$35,750,000, which was

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1 great for our group considering I had the Waikapuna parcel  
2 under agreement for approximately \$4.2 million.

3 At the time of the proposed Lehman closing in  
4 the summer of '05 we had approximately \$420,000 hard money  
5 deposit down, but the terms of the agreement with  
6 Lehman Brothers became just too difficult for myself, John  
7 Kaiser and Chris Manfredi to accept at that time and,  
8 frankly, we took a risk with that piece of property.

9 At the 11th hour I told Lehman Brothers we were  
10 not going to be able to complete the loan deal and they  
11 were very upset with me at that point in time after a few  
12 months of due diligence and a month's worth of legal  
13 preparation, but I felt it was in the best interest of our  
14 project not to close with Lehman Brothers at the time  
15 which frankly would have been all the development money we  
16 needed although it would have been a very expensive and  
17 diluting event for our partnership.

18 I flew over to Maui, one of the other islands in  
19 Hawaii, to meet again with Senator Avery Chumbley and I  
20 expressed my apologies for us not being able to close the  
21 Waikapuna parcel in that time, but in the meeting I  
22 negotiated with Senator Chumbley an eight-week extension  
23 on the Waikapuna project but, again, it was very costly.

24 Q. In what respect was it very costly?

25 A. Senator Chumbley was not happy that we weren't going



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1 to close at that point in time because the Waikapuna  
2 parcel was very heavily sought after by other investors at  
3 the time.

4 But frankly I begged him because we had already  
5 purchased about \$5 million worth of land from him and we  
6 had proposed to be partners on additional parcel after  
7 Waikapuna, I asked him if he would grant us that extension  
8 and he did, at a 1 and a half percent per week penalty fee  
9 on the purchase contract, which equated to \$64,440 of  
10 penalties weekly.

11 I was responsible for making sure that their  
12 bank account receive the \$64,440 wire transfer on the  
13 Monday of each week, which would then allow me the  
14 following seven days to get the deal closed and at the  
15 time I had in the neighborhood of two to three different  
16 hard money lenders in addition to what Mr. Constantine was  
17 working on at the time working diligently to do so,  
18 including negotiating with the gentlemen who originally  
19 introduced me to Lehman Brothers, Mr. Keswing.

20 On a weekly basis for the following seven weeks  
21 I wire transferred \$64,440 to Senator Avery Chumbley's  
22 company, and we at that point had about \$750,000 of hard  
23 money in the deal which meant if I didn't close by the end  
24 of week eight, we were going to lose the entire \$750,000.

25 So what I did was I spoke -- Mr. Constantine was

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1     aware of what I was doing with the other lenders, but  
2     probably around week five or six I told Mr. Constantine  
3     that I was in a very difficult position, and asked him if  
4     there was anybody he could speak to in his lending circle  
5     that would allow us to close on this very valuable piece  
6     of land without losing this wonderful opportunity for our  
7     investment group, and at that point he spoke to  
8     Mr. Grdina, who I didn't know at the time, and they came  
9     back to me in about week six and said, we can do it, but  
10    here are the terms that Mr. Grdina would sign off on this  
11    deal.

12    Q.    Did Mr. Manfredi testify as relates to this Urban  
13    Expansion loan in this case?

14    A.    I believe he did.

15    Q.    And who mentioned the word, the urgency of making  
16    this happen, if you recall --

17                 MR. HALEY: Withdrawn.

18                 I withdraw the question.

19    BY MR. HALEY:

20    Q.    Based upon what you told us, Mr. Kenner, was there an  
21    urgency to obtain money real quick to not only stop those  
22    weekly interest payments to make sure the property was not  
23    completely lost?

24    A.    Yes.

25                 By the time we closed the Urban Expansion loan I

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1 had about ten days left before we defaulted on the  
2 \$750,000, approximately, deposited already with C. Brewer,  
3 Senator Avery Chumbley's company.

4 Q. So who came through with the money to make sure that  
5 you didn't lose that property?

6 A. Mr. Constantine did.

7 Q. And how much cash did you need to forestall the loss  
8 of the property and stop these weekly interest payments?

9 A. At that point we needed approximately \$3.621 million.

10 And Mr. Constantine raised \$3.5 million for us.  
11 I deposited another \$100,000 myself and the remaining  
12 balance was funded by residual moneys in the Little Isle  
13 bank accounts.

14 Q. But following the closing, the Lehman closing, more  
15 than \$3.6 million was paid back to Urban Expansion.

16 Is that correct?

17 A. Yes, sir.

18 I believe in the neighborhood of \$6.8 million  
19 was paid by Lehman Brothers at the closing.

20 Q. So can you explain that for us?

21 A. During the negotiations with Mr. Constantine and  
22 Mr. Grdina and their attorneys at the time, in order to  
23 document the deal there were a couple of elements that  
24 they were interested in and primarily it was told to me by  
25 Mr. Constantine that Mr. Grdina was concerned that if he

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1 put up the \$3.5 million, knowing that we were looking for  
2 other development and infrastructure money, that he wasn't  
3 going to disrupt some of his other investments and have me  
4 take him out 30 days later or 60 days later to put him  
5 through the inconvenience for him to make virtually no  
6 money on the deal, and only to our benefit.

7 So as part of the arrangement that they made,  
8 which was very common in all the hard money lending deals,  
9 there were prepayment penalties, and as an example in the  
10 Diamante Cabo San Lucas deal with Lehman Brothers, our  
11 initial funding was \$125 million that I had arranged six  
12 months prior to the Hawaii deal --

13 MR. MISKIEWICZ: Objection.

14 Not responsive.

15 THE COURT: Sustained.

16 Stay focused on this.

17 MR. HALEY: Thank you, Judge.

18 BY MR. HALEY:

19 Q. Mr. Kenner, did you hear the instruction, the court  
20 said stay focused on this question as relates to the money  
21 that got paid back in excess of the \$3.5 million for the  
22 Urban Expansion.

23 A. Yes, sir.

24 THE WITNESS: Thank you, your Honor.

25 A. With respect to the \$6.8 million that Urban Expansion

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1 received at the closing from Lehman Brothers, it was the  
2 original \$3.5 million deposit, plus accrued interest on  
3 the loan at that time which I believe was at 15 percent  
4 interest, plus a couple million dollars that  
5 Lehman Brothers and Windwalker had negotiated with Urban  
6 Expansion through Mr. Constantine and Mr. Grdina to buy  
7 them out of the two contracts that I believe they also had  
8 with us, one of which was a business management contract  
9 whereas on the Waikapuna parcel Mr. Constantine and  
10 Mr. Grdina, through their extensive rolodex of high net  
11 wealth individuals, they believed that they could be very  
12 helpful in the sale of some of those ocean front parcels  
13 when we eventually subdivided the land.

14 Q. You mentioned something a moment ago in connection  
15 with the Urban Expansion loan that had to deal with  
16 prepayment penalties?

17 A. Yes, sir.

18 Q. Did that become part of that \$6.8 million payment,  
19 sir?

20 A. Yes.

21 I believe somewhere in the neighborhood of  
22 \$1 million was a prepayment penalty, and approximately  
23 \$1 million was an agreed settlement amount between  
24 Lehman Brothers, Windwalker and Urban Expansion to buy  
25 them out of the future management agreement.

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1 Q. The bank records, Mr. Kenner, speak for themselves.

2 My question to you is this, sir, was the Urban  
3 Expansion loan and the payments that ultimately flowed to  
4 various individuals following the Lehman closing as a  
5 consequence of the Urban Expansion loan, part of an  
6 artifice or a scheme to defraud your hockey player  
7 clients?

8 A. No, sir.

9 Q. Did some money flow to you after the Lehman closing  
10 that went to Tommy Constantine pursuant to the terms and  
11 conditions of the Urban Expansion loan?

12 A. Yes, sir, it did.

13 Q. And how did that come to be?

14 A. Leading up to those -- the closing with  
15 Lehman Brothers, I told Mr. Constantine that I was getting  
16 divorced at the time, and I was looking to buy a new home  
17 for my ex-wife and our children.

18 Mr. Constantine told me he had a number of deals  
19 that were getting ready to close and fund, in addition to  
20 the Urban Expansion or the Lehman Brothers closing, which  
21 we were still at that time working very diligently to  
22 close. It was frankly no surety that it was going to  
23 close until we finally signed the documents.

24 So Mr. Constantine told me if we stayed focused  
25 on the closing with Lehman Brothers, he would take care of

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1 any short-term loans that I would require to help my  
2 ex-wife and our situation at the time.

3 (Continued on next page.)  
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1 Q And that arrangement with Mr. Constantine was a  
2 preexisting arrangement before the Lehman closing; is that  
3 right?

4 A Yes, sir, it was.

5 Q Mr. Kenner, during the course of the Government's  
6 case there was an excerpt of a clause that the Government  
7 claimed would prohibit such payments, do you know what I'm  
8 speaking of, to you?

9 A That clause was in the Urban Expansion settlement  
10 agreement that was signed at the closing with Lehman  
11 Brothers.

12 A Yes.

13 Q And is there another document that exists, sir, that  
14 would address those payments to you?

15 MR. MISKIEWICZ: Objection to form.

16 THE COURT: Overruled. You may answer that.

17 THE WITNESS: Thank you, your Honor.

18 Q The agreement that we've seen in evidence so far was  
19 the Urban Expansion settlement agreement and the  
20 representations and warranty section that they showed us  
21 governed what Urban Expansion's representations and  
22 warranties were and did not reflect my responsibility to  
23 that Urban Expansion settlement agreement.

24 In the closing documents that were provided to  
25 all my clients and previously were sent out by e-mail, the



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1 representation warranty section for our joint venture,  
2 they were sent out to John Kaiser and Chris Manfredi for  
3 their sign-off in the summer of 2006.

4 Inside our joint venture agreement it clearly  
5 represents that there are other business dealings between  
6 myself and the Urban Expansion partners, in addition, it  
7 also governs any previously existing business  
8 relationships I had with the gentleman from Centrum, when  
9 we heard from Mr. Bruce Berreth.

10 Q Mr. Kenner, I'm going to show you or give you  
11 Government's Exhibit 770, and ask you to take a look at  
12 the documents contained in this exhibit, and, sir, please,  
13 do not read every document.

14 But prior to me showing you this document, did  
15 you look at this document?

16 A Yes, I did.

17 Q Or these documents, these four binders?

18 A Yes, sir.

19 Q Would you kindly identify that provision that you  
20 believe is applicable to the payments that you received,  
21 the payments that ultimately came to you as relates to  
22 moneys concerning your wife and those other aspects?

23 A Yes, sir. I don't believe that the monies that went  
24 to my ex-wife's home actually were covered by the Urban  
25 Expansion residual funds, but I believe it was just the

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1 incremental, I believe, \$419,000.

2 Q Okay.

3 A There were four documents that we produced at the  
4 closing through our approximate ten law firms that dealt  
5 with the closing, and in here these documents were sent,  
6 as Mr. Sydor sent back, to each one of the members of  
7 Little Isle IV after the closing. I received all of the  
8 documents from our closing attorney, Mr. Larry Markowitz,  
9 who handled the transaction primarily on our side for our  
10 joint venture partners, volume 2 of 2 titled Acquisition,  
11 Joint Venture in Loan Documentation with respect to  
12 Windwalker Hawaii, LLC's investment on the Big Island of  
13 Hawaii. Closing date: August 14, 2006, volume 2 of 2,  
14 under the representations and warranty section which is  
15 recognized in the table of contents on 361 under  
16 subsection VII [sic] for 17, following the first portion  
17 of the paragraph it actually reads, notwithstanding the  
18 foregoing, Windwalker acknowledges that JV partner, which  
19 is our side of the partnership, may be involved in  
20 business transactions unrelated to the property with the  
21 holders of parcel 2, which is Centrum, and parcel 3 debt,  
22 which was the Urban Expansion lending.

23 This section in its entirety was forwarded to  
24 Chris Manfredi and John Kaiser long before the closing and  
25 long before their signatures on the acknowledgment consent

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1 letter on July or August of 2006 for their approval  
2 knowing what the previous relationships were.

3 Q But notwithstanding their knowledge as relates to  
4 your understanding of that provision, did you have a  
5 good-faith belief that then permitted the payments that  
6 came to you that we're talking about?

7 A The loan agreements, yes. In fact that issue was  
8 raised in the preliminary term sheet that was signed  
9 between Lehman Brothers, myself on behalf of our entities  
10 and Alan Warden, at the very beginning of the negotiations  
11 long before any of these documents were commenced, the  
12 same not withstanding language.

13 Q The Government's exhibits you have in front of you,  
14 is there anything fraudulent or fictitious about those  
15 documents?

16 A No, sir.

17 Q Other than Government's Exhibit 5104, wherein  
18 Mr. Kaiser claims that someone, purportedly you or  
19 Mr. Constantine forged his signature on the document,  
20 Mr. Kaiser's signature appears on a multitude of other  
21 documents as relates to the Hawaiian land investment, is  
22 that true, sir?

23 A Yes.

24 Q Does his signature appear on a funding consultant  
25 agreement -- excuse me, on an environmental indemnity

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1 agreement?

2 A Yes, sir. It does.

3 Q Does it appear on an equity transfer agreement?

4 A Yes, sir. It does.

5 Q Does it appear on some other loan agreement?

6 A There are as you said a multitude of documents that  
7 Mr. Kaiser signed in or around the closing but the ones  
8 you mentioned previously I recall specifically.

9 Q Okay.

10 Did you forge his signature on any of those  
11 documents, Mr. Kenner?

12 A No, sir.

13 Q Based upon your testimony to this point in time,  
14 Mr. Kenner, I will show you a chart. I'll put it up on  
15 the screen.

16 MR. HALEY: Excuse me. Let me mark it, Judge.

17 Your Honor, I believe I've stipulated with  
18 counsel, Kenner Exhibit 215 will be offered as a chart on  
19 behalf of the defendant.

20 MR. MISKIEWICZ: So stipulated by the  
21 Government.

22 MR. LARUSSO: May I see it?

23 Thank you.

24 No objection, your Honor.

25 THE COURT: Kenner 215 is admitted.

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1 (Whereupon, Defendant's Exhibit K 215 was  
2 received in evidence.)

3 Q I will ask you to take a look at it in a moment.

4 Little Isle IV Partners, sir --

5 A Yes, sir.

6 Q And it speaks for itself, but as an aid to the jury,  
7 does that accurately reflect Hawaiian Partners capital  
8 distributions at least as you know them to be, sir?

9 A Yes, sir.

10 Q And would you just give us a summary, Mr. Kenner, of  
11 the meaning of that document?

12 A The Little Isle IV was the general LLC that was our  
13 pool of investor funds. So whether the line of credit  
14 funds came from Mr. Murray, Mr. Norstrom, Mr. Peca,  
15 Mr. Sydor, Mr. Rucchin, Mr. Nolan, myself, John Kaiser or  
16 any of the other approximately 20 cash investors that  
17 ranged from 25,000 to 100,000. Little Aisle IV is where  
18 we gathered approximately \$13 million in capital  
19 contributions and that's how we, with respect to everybody  
20 myself and John Kaiser, determined how much equity or  
21 ownership each individual had in Little Isle.

22 Once the funds, whether they were taken out for  
23 line of credit or not at the time, were used on a monthly  
24 basis on some of those expenses, and that is not an  
25 all-encompassing list. Land planners, Hawaiian and other

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1 attorneys, architects, archeologists --

2 MR. HALEY: Mr. Kenner, we can read the  
3 document.

4 THE WITNESS: Okay.

5 Q That gives up some sense, does it not, of the  
6 expenses that would be paid by virtue of the pool accounts  
7 that came into Little Isle IV; is that correct?

8 A Yes, sir, that is correct.

9 Q That includes LOC monthly fees?

10 A Line of credit monthly fees that would go back to the  
11 different investor lines of credit.

12 Q But not necessarily related to a specific --  
13 withdrawn.

14 Now, did you create, Mr. Kenner, based upon bank  
15 records, and indeed based upon your personal knowledge of  
16 payments that are traceable to, for example, Michael  
17 Peca's line of credit, a chart?

18 A Yes, sir, I did.

19 Q And when I say "personal knowledge" you know of these  
20 transactions, sir, because you were personally involved,  
21 is that true?

22 A Yes, sir.

23 Q I'm going to show you, and I'll ask you to take a  
24 look at Kenner Exhibit 216.

25 A Yes, sir.

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1 Q And what is this, sir?

2 A That was the chart I put together to demonstrate the  
3 cash flow that was utilized out of Mr. Peca's line of  
4 credit.

5 Q And how were you able to create this document,  
6 Mr. Kenner?

7 A It was created by documents that the U.S. Government  
8 had provided to you during discovery that you had  
9 subsequently forwarded to me for review.

10 Q In addition to that, what level of knowledge do you  
11 have with reference to each one of these transactions?

12 A Complete.

13 Q How so?

14 A I was in charge of the transactions.

15 MR. HALEY: Your Honor, I believe by stipulation  
16 it is admitted as 216.

17 MR. LARUSSO: May I see it?

18 MR. MISKIEWICZ: The Government has no  
19 objection.

20 MR. LARUSSO: Thank you.

21 No objection, your Honor.

22 THE COURT: K 216 is in evidence.

23 (Whereupon, Defendant's Exhibit K 216 was  
24 received in evidence.)

25 Q Mr. Kenner, taking a look at K 216, Peca LOC

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1 distributions, what do you mean by Peca LOC distributions?

2 A Could you focus that please a little better.

3 MR. HALEY: Sure.

4 A Peca line of credit distributions.

5 Q So we see 4-4-05. That figure, what does that  
6 represent in the block?

7 A Shortly after Michael Peca established his line of  
8 credit for the Northern Trust Bank and pursuant to  
9 conversations I had with Mr. Peca about his initial  
10 contribution, we established the \$1.6 million line of  
11 credit and immediately upon availability I withdrew under  
12 my discretion \$1.25 million from Mr. Peca's line of credit  
13 and I forwarded it to Mr. Nolan's line of credit, being  
14 that Mr. Nolan carried a substantial financial burden from  
15 his line of credit at that point in time.

16 Q Going to the next page, can you explain to us what  
17 that represents, sir?

18 A On the 12th of April, 2005 we had more commitments  
19 and more dealings with respect to Little Isle IV. I  
20 withdrew 350,000 from Mr. Peca's line of credit, had it  
21 deposited into the Little Isle IV bank account and  
22 pursuant to our 2004 operating agreement, I advanced  
23 \$240,000 to the 15 percent Ken Jowdy loan.

24 We also owed Mr. Constantine \$37,500 under his  
25 consulting agreement at the time. And in addition I paid



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1 several other hard money lenders advance fees who were  
2 hard money lenders acting very similar as Mr. Constantine  
3 was working on our behalf to look for additional funding  
4 for our Hawaii partners.

5 Q Those hard money advance fees are not detailed on  
6 that sheet, are they, sir?

7 A They are not, but represented on either the Little  
8 Isle IV or the Ula Makika bank statements.

9 Q The next page. What does that mean?

10 A On July 7, 2005, I withdrew from Michael Peca's line  
11 of credit \$120,000 and transferred it to the Little Isle  
12 IV bank account pursuant to our authorization letter  
13 signed by Mr. Peca. Once in Little Isle IV, I distributed  
14 \$25,000 to an escrow account with respect to our Hawaiian  
15 land development project. I also advanced more fees to  
16 other hard money lenders at the time and then as an  
17 internal transfer, I asked Northern Trust bank to transfer  
18 \$26,000 to Big Isle IV to cover expenses with relation to  
19 Big Isle IV operations which included expenses to me,  
20 archaeological consultant fees, land planning consulting  
21 fees and several property tax payments.

22 Out of the Big Isle IV expenses, those were  
23 about \$18,000 of the \$26,000 transferred were actually  
24 used for those purposes.

25 Q Now, when we see Kenner expenses -- one second. What

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1 does that mean when we see "Kenner expenses"?

2 A Throughout the Little Aisle IV or Ula Makika  
3 expenses, either expenses I paid for on my credit cards  
4 with respect to travel and entertainment in relation to  
5 the project or a \$2,000 a month consulting fee paid to one  
6 of my entities which also incurred expenses on behalf of  
7 the Hawaiian projects.

8 Q As it relates to those records regarding Kenner  
9 expenses, where are those records located?

10 A The \$2,000 a month consulting payment and the  
11 reflection of the actual expenses distributions would be  
12 on the banking statements, but the underlying expense  
13 reports are no longer in my possession, but the other  
14 expenses related to the underlying reports would be  
15 reflected on any of my credit card bills at the time.

16 Q How is it that the underlying expense records are no  
17 longer in your possession?

18 A In or about February, March of 2007, I had terminated  
19 a former office manager per my standard advisor's practice  
20 who was in possession of my corporate hard drives and  
21 backup hard drives, and she took them and kept them in her  
22 possession after termination.

23 Q What is the name of the person?

24 A Kristin Myrick.

25 Q Is that the same Kristy Myrick that is or was a

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1 defendant in a lawsuit that you commenced against her,  
2 sir?

3 A Yes, sir, it is.

4 Q Were those records obtained through the discovery  
5 process in that lawsuit?

6 A We sought to obtain them, but at a certain point in  
7 time in discussions with my attorneys, we chose not to  
8 further pursue it because it became very costly through  
9 motion practice to do so.

10 Q Let's go to the next page.

11 Would you explain to us what that is?

12 A On July 14, 2005, I requested two advances, excuse  
13 me, requested one advance of \$30,000 from Mr. Peca's line  
14 of credit from Northern Trust bank to be forwarded to  
15 Little Isle IV's operating bank account. Of that, \$30,000  
16 I used \$15,000 as an advance to Mr. Jowdy pursuant to the  
17 15 percent loan agreement that we had, and I also advanced  
18 more hard money fees to other hard money lenders who were  
19 seeking development money and infrastructure money for us  
20 in our Hawaii partners.

21 On the 15th of July, 2005 I requested another  
22 advance of \$25,000, which traveled through Little Isle  
23 IV's bank account, and that 25,000 became a portion of  
24 \$110,000 that at the time I transferred to Ula Makika  
25 which was established in or around the summer of 2005;

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1 \$50,000 at the time that was in Ula Makika's bank account  
2 went to Diamante del Mar's portion of Mr. Jowdy 15 percent  
3 loan agreement, \$50,000 was forwarded to Mr. Jowdy's  
4 personal company, Baja Development, pursuant to the  
5 15 percent loan agreement and in fact \$50,000 of those  
6 funds were forwarded to Lehman Brothers at the time  
7 pursuant to prepayment advance fees on that 2005 loan that  
8 we agreed to and then subsequently walked away from.

9 Q Mr. Kenner, I do not want you to be repetitive in  
10 your testimony but we've seen a couple instances where it  
11 says hard money advance fees. How does that benefit the  
12 project, the Hawaiian project when you pay out for hard  
13 money advance fees in a very summary fashion?

14 A In the hard money lending arena, which I learned as I  
15 was going through the process, many hard money lenders,  
16 much like Mr. Constantine's hard money funding arrangement  
17 with us, would not begin to put together loans for our  
18 company or for anyone unless you paid them a due diligence  
19 fee up front, and those fees in my experience had ranged  
20 anywhere from \$10,000 to \$975,000.

21 Q Okay. Going to the next page, we see 395,000 to  
22 Kaiser Ledbetter?

23 A Yes, sir.

24 MR. HALEY: I'll hold off questioning at this  
25 point in time that relates to the transfer. We'll be

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1 covering that at some later point for purposes of  
2 continuity and organization.

3 MR. MISKIEWICZ: Objection.

4 MR. HALEY: I'll withdraw that comment, Judge.

5 Q I'll not ask you questions, Mr. Kenner at this point  
6 in time with reference to that 395, but we can agree that  
7 \$395,000 of Michael Peca's money went out with reference  
8 to the Kaiser-Ledbetter event is that correct?

9 A Yes, on October 19, 2006.

10 Q And finally, sir, what DOES that payment reflect?

11 A On April 23, 2007, while we were not in receipt of  
12 Mr. Jowdy's loan repayment to us, we continued to be faced  
13 with monthly line of credit fee obligations for Little  
14 Isle IV, so I requested \$60,000 from Mr. Peca's line of  
15 credit, deposited into the pool corporate account for  
16 Little Isle IV and asked Mr. Mascarella at Northern Trust  
17 bank to pay the lines of credit that had outstanding  
18 monthly fees on them.

19 Q And finally, sir, with reference to the last page of  
20 the document, what does that reflect?

21 A On April 23, '07, I did the same thing. I asked for  
22 a \$101,345 advance from Mr. Peca's line of credit through  
23 Mr. Mascarella to be forwarded to the Little Isle IV bank  
24 account and then pursuant to representations from  
25 Mr. Mascarella what was due on each of the lines of credit

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1 I asked him to disseminate the money appropriately to pay  
2 down the monthly line of credit fees on the Little Isle IV  
3 investors.

4 Q Now, when you first established the lines of credit  
5 through consultations with your clients, did you provide  
6 them this level of detail in connection with the use of  
7 the line of credit, Mr. Kenner?

8 A Not to this detail.

9 Q Why not?

10 A Our discussions were -- the information I had, I  
11 transmitted to my clients, was based on verbal  
12 communication I would have at their house.

13 I think we saw some of Mrs. Peca's handwritten  
14 notes, that was similar to the notes I would provide for  
15 the clients while we would sit and go through the details.  
16 So verbally I would explain what had gone on and what we  
17 were doing with the corporate accounts and the cash flows  
18 coming in and out of the different accounts and I would  
19 make notes like that and hand them to the clients at the  
20 end of the meeting for their records.

21 Q Well, in connection with the establishments of the  
22 line of credit accounts, did or did they not have an  
23 understanding that their lines of credit and the moneys  
24 that were taken from the lines of credit were going to be  
25 pooled?

**Kenner - Direct/Haley**

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1 MR. MISKIEWICZ: Objection.

2 THE COURT: When you say "they," who are you  
3 referring to?

4 MR. HALEY: Excuse me, Judge. The specific  
5 hockey player clients that are alleged to be victims in  
6 the indictment.

7 THE COURT: Overruled. You may answer that.

8 A Yes, sir, they were aware.

9 Q So, what happened to the Hawaiian land development  
10 project?

11 A After August of 2006, we were sent \$6.9 million at  
12 the Lehman Brothers closing which we had disseminated to  
13 the different investors that the time and held back just  
14 under a million dollars for ongoing expenses for the  
15 company which in effect became the line of credit monthly  
16 fees primarily.

17 Over the following two years, Alan Warden and  
18 Windwalker, prior to the bankruptcy by Lehman Brothers in  
19 or about September of 2008, was in charge of the monthly  
20 budgets and the operations of the company.

21 Mr. Warden --

22 MR. HALEY: Sir, let me interrupt you --

23 THE WITNESS: Yes, sir.

24 Q -- Only for this purpose.

25 Lehman Brothers was the entity that gave the

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1 funding for further development of the Hawaiian land  
2 development property; is that correct?

3 A Yes, sir.

4 Q What happened with Lehman Brothers?

5 A In or about September 2008, Lehman Brothers  
6 commercial banking division filed for bankruptcy and  
7 ceased any future lending to projects they had on the  
8 books, one of which was our Hawaii development project.

9 Q You testified that in the early 2000s period land  
10 development in Hawaii, you used the word was embryonic or  
11 angel?

12 A Embryonic in its current phase.

13 Q Was that a good or bad thing, embryonic in its growth  
14 phase?

15 A It was very fortunate for us to be involved at the  
16 time.

17 Q But something happened thereafter with respect to the  
18 real estate market; is that correct?

19 A Yes, in or about 2008, the same time that the Lehman  
20 Brothers bankruptcy took place, the real estate markets  
21 both in Hawaii and on the mainland U.S.A. were severely  
22 devastated.

23 Q I'll use the term, Hawaii project land development,  
24 is that -- today, what corporate entity exists as it  
25 relates to your hockey player clients' investments in the



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1 Hawaii land development project that are reflected in  
2 those hockey players clients named as alleged victims in  
3 this matter?

4 A Na'alehu Ventures 2006 LLC, is still in existence  
5 today, managed by John Kaiser, and one of the partners of  
6 Na'alehu 2006 is still Little Isle IV LLC.

7 The only true remaining assets that I believe is  
8 held by the company is the loan arrangements to Mr. Jowdy.

9 Q Which remains unpaid.

10 A Which remains unpaid today.

11 Q With respect to the corporate entity and the interest  
12 that your hockey players have in that entity has some  
13 value; is that correct?

14 A Yes, I believe it is in the neighborhood of  
15 \$19 million today.

16 Q How do you calculate that?

17 A The initial transfers that went to Mr. Jowdy from  
18 November 2004 through March of 2006 and then calculated at  
19 15 percent interest rate compounded until nine years later  
20 today.

21 Q Well, there's testimony, sir, that lawsuits as  
22 relates to Mr. Jowdy were dismissed without prejudice. Do  
23 you recall that testimony?

24 A Yes, sir. I do.

25 Q I know you are not a lawyer but do you have an

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1 understanding what the term "without prejudice" means?

2 A Yes, sir.

3 My understanding is that it means that any time  
4 in the future we can file lawsuits against Mr. Jowdy  
5 without any adverse cause by us dismissing the lawsuit at  
6 the time.

7 Q And I know there was testimony, sir, from  
8 Mr. Richards that it was his opinion at a particular point  
9 in time due to the fact that Mr. Jowdy assets was in  
10 Mexico, at least at that point in time, he felt  
11 comfortable in recommending the dismissal of the lawsuit  
12 without prejudice.

13 Do you recall that testimony?

14 A Yes, I do. I believe that was one of the reasons.

15 Q But that was Mr. Richards' opinion at that time, is  
16 that true?

17 A Yes, sir, it was.

18 Q And you haven't -- have you had the opportunity, sir,  
19 to let's say within the last 20 months, consult another  
20 attorney in connection with the viability of such a  
21 lawsuit and the ability to obtain judgment here in the  
22 United States, or pursue actions in Mexico for recovery of  
23 that loan?

24 A I have but it has been very difficult.

25 Q By the way, have you been to Diamante Cabo San Lucas?

**Kenner - Direct/Haley**

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1 A I've not been allowed on the property since on or  
2 about 2008 when our negotiations broke down.

3 Q Prior to that point in time had you seen the  
4 property?

5 A Yes, sir, on a very regular basis.

6 Q And there was some testimony regarding the property  
7 and the apparent value of that property. Can you describe  
8 it, Diamante Cabo San Lucas, to the jury? What does it  
9 look like?

10 MR. MISKIEWICZ: Objection.

11 THE COURT: Overruled. Briefly describe it.

12 THE WITNESS: Thank you, your Honor.

13 A The project itself sits on 1500 acres of land, just  
14 to the west of downtown Cabo San Lucas, one of the largest  
15 development parcels in South Baja where Cabo San Lucas is  
16 located. The property now possesses two championship golf  
17 courses and a number of vertical construction buildings  
18 are used in a hotel-like fashion in addition to a number  
19 of amenities that have been developed over the years,  
20 specifically since the majority have been developed since  
21 2010 when our negotiations broke down and we dismissed the  
22 case through Mr. Richards.

23 Q To your knowledge, does the Diamante Cabo San Lucas  
24 cater to a particular clientele?

25 A Originally our goal was to initiate our membership

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1 drive with professional athletes and entertainers, but  
2 certainly subject to the litigation that ensued with  
3 Mr. Jowdy, you know, that has changed some of the  
4 marketing direction with my dismissal.

5 Q Now, I'm going to ask you to take a look at a chart  
6 that has already been admitted in evidence as Government's  
7 Exhibit 21. Do you see it or not?

8 THE COURT: You have to zoom in.

9 MR. HALEY: Thank you, Judge.

10 THE WITNESS: Okay. Thank you.

11 MR. HALEY: Does that help?

12 THE WITNESS: Yes, sir.

13 A Okay.

14 Q Does that chart have any meaning to you, Mr. Kenner?

15 A Yes, sir, it does.

16 Q In what respect?

17 A This appears to be the distribution from the funding  
18 closing with Lehman Brothers where they forwarded  
19 approximately \$6.8 million to us at the close of escrow in  
20 August of 2006 into our newly formed bank account for  
21 Na'alehu Ventures 2006.

22 Q For my edification, at that closing there are also  
23 repeated payments in the amount of \$42,500 to Schwab. Do  
24 you recall that?

25 A There were for the cash investors?

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1 Q Yes.

2 A That had deposited originally 100,000 investments.

3 Q Right.

4 A They each received a wire transfer \$42,553. I  
5 believe the majority of those deposits were sent back to  
6 the original investors' Schwab bank account.

7 Q Does this chart reflect those payments to the  
8 individual hockey player's investments?

9 A I believe it does, as a portion of line 4 in the box  
10 on the bottom left where it represents other distributions  
11 during the period of \$2.9 million.

12 I believe those \$42,000 payments, in addition to  
13 smaller payments that were made to smaller investors, are  
14 a subset of that approximate \$2.9 million.

15 Q Well, Mr. Kenner, do you recall on occasion during  
16 the direct testimony of one or more government witnesses,  
17 whether the question was asked of one or more government  
18 witnesses whether they ever received a penny back from  
19 their line of credit or for their cash investment? Do you  
20 recall that?

21 A I recall several witnesses testifying to that.

22 Q Do you recall their answers initially?

23 A I believe they all said they received nothing back.

24 Q But they were in error, were they not, sir, when they  
25 gave that answer?

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1 A I believe they were.

2 Q Because this chart reflects at least what they did  
3 get back by your own testimony, true?

4 A Yes, sir. That is correct.

5 Q Now it's not full recovery, as indicated, isn't that  
6 true?

7 A That's correct. There was not a full recovery.

8 Q At least not today, correct?

9 A Not as of yet.

10 MR. HALEY: Your Honor, I'm ready to move into  
11 another area. Perhaps this would be --

12 THE COURT: Okay. We'll take the break. Why  
13 don't we say 1:50, an hour from now.

14 Don't discuss the case.

15 (Whereupon, at this time the jury exits the  
16 courtroom.)

17 (Afternoon recess taken.)

18

19

20

21

22

23

24

25

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1 A F T E R N O O N S E S S I O N

2

3 THE CLERK: All rise.

4 THE COURT: Please be seated.

5 All right, let's bring in the jury.

6 Mr. Kenner, please return to the stand.

7 (The witness resumes the stand.)

8 THE COURT: At the end of the day today the  
9 juror who has the scheduling issues, I will leave him out  
10 here.

11 My thinking is to accommodate him next week as  
12 long as he doesn't have vacation, but I'm concerned about  
13 the timing. We're on day two and we're in sphere two.

14 I have to have a discussion with you before I do  
15 that because I'm concerned.

16 MR. HALEY: Not all the spheres are of the same  
17 dimension.

18 THE COURT: I was hoping that would be your  
19 answer.

20 MR. HALEY: It's true, sir.

21 Your Honor, if I may, in my own defense, I'm  
22 trying to keep my client's testimony within the context of  
23 the allegations in the indictment and there's multiple  
24 allegations.

25 THE COURT: As you can see, I haven't said

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1 anything yet because I agree with you and you have been  
2 efficient but I'm anticipating there's going to be overlap  
3 in the different spheres, so just be cognizant of that.

4 MR. HALEY: I'll do my best, Judge.

5 THE CLERK: All rise.

6 (The jury is present.)

7 THE COURT: Please be seated.

8 Go ahead, Mr. Haley.

9

10 BY MR. HALEY:

11 Q. Mr. Kenner, finishing up on the Hawaiian land  
12 development aspects of the indictment, there was some  
13 testimony throughout the government's direct case that  
14 suggested that the prepayment penalties with reference to  
15 the Urban loan were excessive.

16 Do you recall a suggestion made in that regard?

17 A. Yes, I do.

18 Q. Is that the first time you had encountered prepayment  
19 penalties as relates to, let's say, loans associated with  
20 the Hawaiian land development or had there been other  
21 instances where you saw similar such prepayment penalties?

22 A. There have been others.

23 Q. Could you just give us one example, sir.

24 A. In March of 2006, approximately five months earlier  
25 when I closed on the \$125 million development loan in Cabo



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1 San Lucas, Lehman Brothers had a \$125 million prepayment  
2 penalty.

3 Q. Now, Mr. Kenner, I'm going to read to you just a  
4 paragraph in the indictment that falls under what is  
5 characterized as the Eufora investments. It reads as  
6 follows:

7 There was a further part of the scheme to  
8 defraud that between February 2008 and May 2009, the  
9 defendant Kenner convinced -- and at this point I'm going  
10 to substitute the names rather than the John Does -- Peca,  
11 Sydor, Rucchin, Ranford and Nash to invest money in  
12 Eufora, in exchange for an ownership interest in the  
13 company, by representing to each of them that Eufora was a  
14 promising company with great potential for growth.

15 Is that sentence essentially accurate, sir?

16 A. The portions of the sentence that represent those  
17 individuals did invest in Eufora for a portion of the  
18 company and Eufora was an up and coming I believe was the  
19 term?

20 Q. Was a promising company with great potential for  
21 growth.

22 A. Yes, that is correct.

23 Q. Staying, sir, with that aspect of the indictment.

24 When you made the -- withdrawn.

25 When you had conversations with those hockey

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1 player clients, specifically Peca, Sydor, Rucchin, Nash  
2 and Ranford regarding Eufora, what was Eufora at that  
3 point in time in the nature of its corporate structure,  
4 sir?

5 A. Although I hadn't been an active member of Eufora  
6 since about 2005, my understanding from the different  
7 corporate officers was that Eufora was an Arizona LLC and  
8 held the ownership of a number of my investment clients at  
9 that time.

10 Q. And as relates to Eufora in and of itself, was it a  
11 publicly traded company or privately held company?

12 A. At all times that I'm aware Eufora has been a private  
13 company.

14 Q. Given your background and experience as a financial  
15 advisor, and given the licenses you hold, sir, would you  
16 simply explain the similarities, differences, if any,  
17 between a publicly held corporation and a privately held  
18 corporation?

19 A. In a simple version a publicly held company, the  
20 shares that trade on a daily basis are shares that trade  
21 from one investor to another investor and they go through  
22 a public medium typically known as a clearing house.

23 Private companies in general, if you're not part  
24 of the initial stock purchase or offering of the company,  
25 as Mr. Constantine released in 2002, every other share

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1 from that point forward is typically going to be a  
2 repurchase of somebody else's ownership in that company  
3 unless the corporation by design decides to offer  
4 additional stock and actually dilutes the current  
5 ownership base of the company.

6 I don't believe Eufora had done a delusion  
7 offering at any point that I'm aware of.

8 Q. So, by way of example, let's say Microsoft or  
9 Facebook, as they exist today, are publicly traded  
10 companies; is that correct?

11 A. Yes, sir.

12 Q. And if I am purchasing shares from an individual who  
13 owns shares in let's say Microsoft or Facebook, what  
14 occurs?

15 A. You would typically have a brokerage account at a  
16 company anywhere around the world, and that brokerage firm  
17 would place your shares available to be sold, somebody on  
18 the other end of the transaction who you would never meet  
19 would also be at a brokerage firm typically and ask for a  
20 certain number of shares to be purchased.

21 Both the purchase and the sale offers would be  
22 matched up typically by a clearing house associated with  
23 that stock exchange that Microsoft or Facebook were  
24 trading on, and the transaction would complete itself in  
25 an anonymous way.

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1           The seller would receive cash that they would  
2           then be in possession of and the buyer would receive the  
3           stock pursuant to that transaction.

4           Q.    So I as a seller receive this cash?

5           A.    Yes, sir.

6           Q.    What restrictions, if any, do I have in terms of the  
7           cash I receive?

8           A.    None. That's your cash.

9           Q.    Let's get specific now, sir, in terms of Eufora.

10                  At the point in time you were recommending to  
11           your clients that they obtain an ownership interest in  
12           Eufora, how were they acquiring that ownership interest in  
13           Eufora at that point in time?

14           A.    During the time frame reflected in the indictment,  
15           the ownership in 2008, with exception of Mr. Murray's  
16           December 31st, 2008 transaction, were all private  
17           purchases from stock that Mr. Constantine had controlled  
18           either personally or through one of his own entities.

19           Q.    So when Mr. Constantine received cash from your  
20           clients, what restriction, if any, did he have on the use  
21           of that cash?

22                  MR. MISKIEWICZ: Objection.

23                  THE COURT: Sustained as to form.

24           BY MR. HALEY:

25           Q.    Well, when you were having discussions with your

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1 hockey player clients, specifically Mr. Peca, Mr. Sydor,  
2 Mr. Rucchin, Mr. Nash and Mr. Ranford in reference to  
3 paragraph 12 of the indictment, would you describe to the  
4 Court and jury the nature of those discussions that you  
5 had with those individuals in terms of how they were  
6 acquiring an interest, ownership interest, in Eufora and  
7 the means by which they would acquire an ownership  
8 interest?

9 A. After a brief summary with each of those individuals  
10 about the status of Eufora and the potential for growth  
11 that was apparent at the time, I represented to each one  
12 of them that one of the members of Eufora, specifically  
13 Mr. Constantine at the time, was looking to sell some of  
14 his stock to raise money for personal issues, and it was  
15 only a very small portion of his ownership at the time,  
16 and if they were interested, there would be an opportunity  
17 to purchase Mr. Constantine's private stock in exchange  
18 for a trade of ownership for cash.

19 Q. Well, in connection with that conversation,  
20 Mr. Kenner, did or did you not make any specific  
21 recommendation or representation that the cash that would  
22 be going to Mr. Constantine would in turn be put  
23 immediately or subsequently into Eufora for any particular  
24 purpose?

25 A. No, sir.

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1 Q. Who was the account holder on the account known as  
2 Constantine Management Group?

3 A. To the best of my understanding it's  
4 Mr. Constantine's account.

5 Q. Well, based upon the conversations you had with your  
6 clients as you told us, your hockey player clients, was it  
7 part of a scheme or artifice to defraud when that money,  
8 for purposes of acquiring a percentage of  
9 Mr. Constantine's ownership interest in the company, was  
10 sent to Constantine Management Group?

11 A. No, it was not.

12 Q. In what sense, sir, and in what way did you feel  
13 comfortable in making those recommendations to those  
14 specific individuals concerning acquiring an ownership  
15 interest in Eufora?

16 MR. MISKIEWICZ: Objection.

17 THE COURT: No, that's okay. You can answer  
18 that.

19 A. In 2008, to the best of my recollection, there were  
20 too many elements that were important to my  
21 recommendation.

22 It was a good time to invest in Eufora. One of  
23 which was I knew that Mr. Constantine and members of the  
24 company had been working diligently on acquiring a  
25 multimillion dollar operating capital loan which will

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1 allow the company to go out and further invest in some of  
2 their marketing strategies which I believed at the time  
3 were very cutting edge and unique in the marketplace for  
4 both the credit card and the prepaid card world.

5 And, second, I knew, based on conversations with  
6 some of the same principals at Eufora, that they were  
7 about to be given or granted their final patents on  
8 several of the very critical patents that they were  
9 seeking and were pending for the prior five or six years.

10 Q. Can you give us an example, Phil, of a company, a  
11 privately held company, where an individual -- where  
12 individuals had an ownership in that privately held  
13 company and the company was thereafter transformed into a  
14 publicly held company by way of what's called an IPO, is  
15 that it?

16 A. Yes, sir.

17 MR. MISKIEWICZ: Objection.

18 THE COURT: Sustained.

19 I don't think we need to get other examples  
20 unrelated to the case.

21 MR. HALEY: Okay.

22 BY MR. HALEY:

23 Q. The conversations you had with Mr. Sydor,  
24 Mr. Rucchin, Mr. Nash and Mr. Ranford concerning Tommy  
25 Constantine's desire to obtain cash by way of selling a

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1 percentage of his ownership interest in Eufora, where did  
2 those conversations take place?

3 A. To the best of my recollection, those conversations  
4 would have taken place over the phone at that point in  
5 time.

6 I don't recall any specific face-to-face  
7 meetings, but it's entirely possible, because at that  
8 point in time I was probably traveling between 200 and 250  
9 days a year to see my clients.

10 Q. Well, at least one of the hockey player clients  
11 testified that he had a recollection of a conversation  
12 that took place I think in his car in his driveway; do you  
13 remember who that was?

14 A. I don't recall as I sit here. I do recall somebody  
15 mentioning that, but I don't recall which specific  
16 investor that was.

17 Q. Okay.

18 Now, when one of your hockey player clients  
19 purchased a percentage of Mr. Constantine's ownership  
20 interest in Eufora, what should then occur as relates to  
21 the books and records of Eufora?

22 A. I believe --

23 MR. MISKIEWICZ: Objection.

24 THE COURT: I'll let him testify as to what was  
25 going to occur, but not what should occur.



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1 MR. HALEY: Thank you, your Honor.

2 BY MR. HALEY:

3 Q. What was your understanding, sir, as to what would  
4 occur when the individual hockey player client purchased a  
5 portion of Mr. Constantine's share in Eufora?

6 A. My understanding was as soon as our transaction had  
7 complete, and by that I mean wire transfer from the  
8 investor's account into Mr. Constantine's direct account  
9 that one of the officers of Eufora, who I believe was C.R.  
10 Gentry at the time was in charge of documenting that  
11 transaction, to transfer stock from Mr. Constantine's  
12 holdings to the new individual which was held in  
13 Mr. Gaarn's controlled LLC, AZ Eufora Partners I, and on  
14 the books and records of the company would then reflect  
15 that change in ownership.

16 Q. Now, we can agree, can we not, Mr. Kenner, that at  
17 various points in time when your individual hockey player  
18 client would purchase a portion of Mr. Constantine's  
19 ownership interest in Eufora, which may then perhaps go to  
20 Constantine Management Group's account, there subsequently  
21 were transfers out of that account to you, did that occur?

22 A. I believe we saw in this courtroom two transactions  
23 that may have occurred subsequent to investor capital  
24 going to Mr. Constantine for his private stock.

25 Q. Which two are those?

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1 A. If I recall, on April 7 there was a transaction, of  
2 2008, there was a transaction by which Peca acquired a  
3 portion of Mr. Constantine's private stock and  
4 Mr. Constantine wired those funds to me after his receipt  
5 of funds as repayment of a loan I paid to him  
6 approximately five days earlier on April 2.

7 Second, I believe there was a transaction that  
8 the date escapes me for the moment, but it was I believe  
9 with Mr. Tyson Nash.

10 Subsequent to his investment of \$100,000  
11 purchasing Mr. Constantine's private stock,  
12 Mr. Constantine was refunding me \$17,000 and I believe we  
13 saw some of the bubble text messages that reflected a text  
14 message conversation between Mr. Constantine and I in and  
15 around the dates that he refunded \$17,000 to me.

16 Q. When you say refunded 17,000 to you, what do you mean  
17 by that?

18 A. There was a transaction that we saw on one of the  
19 government's exhibits.

20 There was a spreadsheet documenting some of the  
21 Constantine Management Group cash flow by which I had  
22 transferred \$25,000 to Mr. Constantine a few days prior to  
23 the Nash transaction.

24 I believe that I actually asked Mr. Constantine  
25 if he could refund the \$25,000 at that time and based on

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1 our text message conversations, he told me he had some  
2 other needs for some of the funds and asked if \$17,000  
3 would be okay. And I believe I responded okay, cool, and  
4 then forwarded him my bank wiring instructions.

5 Q. With reference to those two particular transactions,  
6 Peca and the second one.

7 A. Mr. Nash.

8 Q. Mr. Nash.

9 When you had the conversation with both Mr. Peca  
10 and Mr. Nash, did you get into that level of detail with  
11 reference to let's say money that Tommy Constantine may or  
12 may not have loaned you, sir?

13 A. I believe I did.

14 Q. As relates to those two transactions, was it part of  
15 an artifice or scheme to defraud both Mr. Peca and  
16 Mr. Nash when you had those conversations, sir?

17 A. No, sir.

18 Q. What is your understanding today regarding Eufora as  
19 a privately held company, the potential for growth and  
20 perhaps return to the owners should the company, let's  
21 say, be sold publicly?

22 MR. MISKIEWICZ: Objection.

23 THE COURT: I'll allow that briefly.

24 A. My understanding at the moment is that the company is  
25 valued somewhere between at a minimum two and three times

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1 the original valuation when the 2008, 2009, transactions  
2 occurred.

3 That would place the company somewhere in the  
4 neighborhood of 50 to \$75 million worth of value to an  
5 outside publicly traded company.

6 Q. Mr. Kenner, I'm going to read the next paragraph in  
7 the indictment:

8 It was further part of the scheme to defraud  
9 that between December 2008 and May 2009, the defendant  
10 Kenner convinced Mr. Rucchin and Mr. Ranford to invest  
11 money in Eufora in exchange for an ownership interest in  
12 the company.

13 As relates to that aspect of the indictment,  
14 both Mr. Rucchin and Mr. Ranford testified in this  
15 courtroom, correct?

16 A. Yes, sir.

17 Q. And would you explain to the best of your memory the  
18 nature of the conversations you had with Mr. Rucchin and  
19 Mr. Ranford concerning that aspect of the indictment?

20 A. In or about the times of their investments, the dates  
21 of their investments, I recall speaking with both of them  
22 on the phone about a subsequent opportunity to purchase  
23 stock from one of the principals at Eufora, named Timothy  
24 Gaarn, who also testified here during this trial.

25 Q. Now, as relates to Timothy Gaarn, at that point in

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1 time what information did you have available to you  
2 regarding his ownership interest in Eufora?

3 A. I was aware, based on the books and records of Eufora  
4 that I had seen, that Mr. Gaarn owned a little bit more  
5 than five percent of Eufora.

6 Q. And preceding the conversations you had with  
7 Mr. Rucchin and Mr. Ranford, what if any conversations did  
8 you have with Mr. Gaarn concerning his ownership interest  
9 and whether or not he had a desire to sell a portion of  
10 that?

11 A. My conversations with Mr. Gaarn began somewhere  
12 around November of 2008 with respect to his ownership  
13 interest in Eufora.

14 Mr. Gaarn, at that time, had owed me north of  
15 \$150,000 for loans that I had personally given to him  
16 between -- the majority of which I loaned to him between  
17 2007 and 2008.

18 And based on the \$267,000 I paid towards the  
19 Hawaiian lines of credit in the latter half of 2008, and  
20 the legal fees that continued to incur based on litigation  
21 efforts versus Mr. Jowdy, I told Mr. Gaarn I really could  
22 use repayment of those funds or as much as he could.

23 Mr. Gaarn, he told me that at the time he really  
24 did not have any assets other than his ownership in Eufora  
25 that had any liquid value or sellable value at that time.

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1 And I told him that I could help him sell some  
2 of the Eufora stock similar to the stock Mr. Constantine  
3 had sold earlier in 2008, and Mr. Gaarn agreed that he  
4 would be willing to sell a portion of his stock to satisfy  
5 the loans initially to me.

6 Q. To your knowledge, what was his financial state at  
7 that point in time, if you know?

8 A. At that point in time I know that Mr. Gaarn had just  
9 finished going through a tougher period of financial  
10 stability for himself and his family, and that was the  
11 basis for the loans that I had provided to him, to help  
12 him with different troubling times, whether it was pending  
13 foreclosure on his home that I bought him out of and  
14 assisted his family, and/or I believe some of the private  
15 school expenses that he had that were critical to his  
16 children at the time.

17 But by the end of 2008 Mr. Gaarn, on his behalf  
18 and my behalf, had begun to work on a series of other very  
19 promising private deals in China and he was working very  
20 diligently on those with the expectation it would be a  
21 significant windfall of income to both Mr. Gaarn and  
22 myself in 2009, 2010.

23 Q. At that point in time with respect to Mr. Gaarn, was  
24 there an understanding as to the process and protocol by  
25 which persons who were purchasing his interest in Eufora

**Kenner - Direct/Haley**

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1 would acquire that interest in terms of how the money  
2 would be conveyed?

3 A. Yes, sir.

4 Q. Would you describe that?

5 A. Yes.

6 Starting in 2008, when members of Eufora had --  
7 excuse me -- when principals of Eufora had hired  
8 Mr. Gentry to restructure the books and accounting records  
9 of the company in order to pursue outside lending sources  
10 which Mr. Constantine had brought to the table for the  
11 company, Mr. Gentry had been tracking on a realtime basis  
12 the sales of Mr. Constantine's stock.

13 And I recall near the end, I believe it was the  
14 last two investors in Mr. Constantine's -- excuse me --  
15 the last two investors who purchased private stock in  
16 Mr. Constantine, Mr. Gentry had instructed us to have  
17 those funds sent through Eufora's bank account prior to  
18 arriving in Mr. Constantine's bank account to make the  
19 tracking mechanism much easier for him for the books and  
20 records of the company.

21 In December of 2008, when we informed Mr. Gentry  
22 that Mr. Gaarn was going to be selling some of his private  
23 stock at that time, he instructed Mr. Gaarn and I to  
24 follow the same protocol he had set up for the last two  
25 investors in Mr. Constantine's private stock.

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1           So each of the transactions that occurred from  
2           December 31st, '08, through I believe May 24 of 2009,  
3           those transactions ran through Eufora's bank account for  
4           accounting and tracking purposes so Mr. Gentry could make  
5           sure, on the books and records of Eufora, that the proper  
6           individuals were granted and recorded as the new owners of  
7           Eufora.

8           Q.    That's different than what occurred when  
9           Mr. Constantine was previously selling stock, right,  
10          because those monies went directly to Constantine  
11          Management Group; is that true?

12          A.    If I recall correctly, there may have been seven  
13          transactions to purchase Mr. Constantine's private stock  
14          and I believe the first five transactions, if my  
15          recollection serves me proper, the first five transactions  
16          did go directly to Mr. Constantine's Constantine  
17          Management Group account.

18               And at that point Mr. Gentry just told us, based  
19          on the fact that he was working quite diligently to make  
20          sure the accounting was proper at the company, it would be  
21          much easier for tracking purposes if the last two  
22          transactions that actually took place went through Eufora  
23          and then to Constantine Management Group.

24          Q.    So as we saw, Mr. Kenner, in bank records, transfers  
25          of money from accounts belonging to Mr. Rucchin and



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1 Mr. Ranford to Eufora, and then from Eufora accounts to  
2 Mr. Gaarn's account, and then from Mr. Gaarn's account to  
3 accounts you controlled, we saw that in the transfers as  
4 reflected in the banking records; is that correct?

5 A. Yes, sir.

6 Q. Do you have an understanding that when that occurred,  
7 when Mr. Rucchin and Mr. Ranford or when money from  
8 Mr. Rucchin and Mr. Ranford's account went first to  
9 Eufora, that the ownership interest was then reflected on  
10 the books and records in terms of Mr. Gaarn's ownership  
11 interest being diminished because he's selling it and  
12 their interest enhanced because they're purchasing part of  
13 his interest?

14 A. That's exactly what happened.

15 Q. Would you describe, Mr. Kenner, the substance of the  
16 conversation you had with Mr. Rucchin and Mr. Ranford  
17 regarding those transactions?

18 A. I believe with each of the individuals, Mr. Rucchin  
19 and Mr. Ranford, I let them know that based on their  
20 familiarity with Eufora, as I believe they were both  
21 previous investors prior to 2008 in Eufora -- excuse me,  
22 they were investors prior to the Gaarn sales at that point  
23 in time, I let them know that Mr. Gaarn, who is a board  
24 member and as they were aware the managing member of AZ  
25 Eufora Partners I, was liquidating a portion of his

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1 private holdings or private ownership in the company and  
2 that the opportunity presented itself as Mr. Gaarn was  
3 looking to raise capital, one, to satisfy some obligations  
4 he had with me, and also because personally he needed to  
5 take care of personal obligations.

6 I do recall that at each time, whether it was  
7 Mr. Constantine's stock or Mr. Gaarn's stock, I do recall  
8 in all of the conversations the individuals asking is  
9 there a reason that the board members or principals of the  
10 company were selling at that time, is there something we  
11 should be aware of that may be adverse?

12 And I told them no. In fact, I think they both  
13 regretted the fact they needed to sell some stock at that  
14 time to raise personal capital, but both of them still  
15 retained a significant portion of their original stock  
16 after the sale.

17 Q. When you spoke to Mr. Rucchin and Mr. Ranford and  
18 told them that it would also result in payment to you in  
19 terms of obligations that Gaarn had to you, how detailed  
20 did you get in that respect?

21 A. I recall specifically with? It was a little  
22 different for both.

23 With Mr. Rucchin, I made him aware that from  
24 June of 2008, after the termination of the negotiations  
25 with Ken Jowdy to satisfy the loan he owed us for the

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1 Hawaii group, to until my last payment towards their line  
2 of credit in December 2008, I did let Mr. Rucchin know I  
3 had personally deposited approximately \$267,000 and it was  
4 a significant amount of my liquid cash.

5 So the fact that Mr. Gaarn was selling some of  
6 his stock and he was going to be able to satisfy some loan  
7 obligations he had with me, it would be very helpful for  
8 me as I continue to front litigation expenses on behalf of  
9 the Hawaii partners through the end of 2008 and into 2009.

10 Now, with Mr. Ranford, the details, it wasn't so  
11 detailed as Mr. Ranford would not have been interested in  
12 what happened in Hawaii as he was not a member at the  
13 time.

14 Q. Mr. Kenner, we saw some bank documents introduced  
15 into evidence wherein \$100,000 transfers were made in  
16 February and May 2009.

17 Whose account, sir?

18 A. Do you recall.

19 A. I believe in February 2009 and May 2009, Mr. Ranford  
20 made two individual purchases of Mr. Gaarn's stock for  
21 \$100,000 and \$100,000.

22 Q. Do you recall, sir, seeing in evidence bank records  
23 that show those \$100,000 payments coming out of his  
24 account during those period of times?

25 A. I believe we saw two documents if I recall correctly.

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1           One was his Charles Schwab bank accounts that  
2 reflected the \$100,000 withdrawals in each of those  
3 months, if I remember correctly, and I specifically recall  
4 the trade confirmations that were mailed by Charles Schwab  
5 to his Bellingham, Washington, address in February and May  
6 2009 reflecting the \$100,000 and \$100,000 withdrawals.

7       Q.   At any point in time did you interfere with the  
8 delivery of those documents from the banking institutions  
9 to his address?

10      A.   No, sir.

11      Q.   Do you recall, as relates to that exhibit, the bottom  
12 portion of that exhibit, indicating in writing that if you  
13 have any questions concerning this transaction in sum and  
14 substance, contact the bank.

15           Do you remember that?

16      A.   Yes, sir, I do.

17      Q.   Subsequent to those transfers in February and May,  
18 did Mr. Ranford have any communication with you with  
19 respect to those documents that he presumably received?

20      A.   No, sir.

21      Q.   I'm going to read another paragraph to you, sir, out  
22 of the indictment:

23           14. It was a further part of the scheme to  
24 defraud that between November 2009 and December 2009, the  
25 defendants Kenner and Constantine convinced -- and I'll

**Kenner - Direct/Haley**

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1 substitute the John Doe -- Privitello to invest money in  
2 Eufora in exchange for an ownership interest in the  
3 company.

4 The defendant Constantine then unlawfully  
5 converted certain money for unauthorized purposes,  
6 including for his personal benefit, and disavowed  
7 Privitello's ownership interest in Eufora.

8 Would you kindly relate to the Court and jury  
9 your knowledge, understanding and involvement with  
10 reference to that allegation in the indictment.

11 A. It's false.

12 Q. In what respect, sir?

13 A. I had no communication with Nick Privitello at all in  
14 December 2009 with respect to his investment in Eufora,  
15 nor was I aware of his investment sometime in early 2010.

16 Q. Were you aware that there came a point in time where  
17 a civil lawsuit was filed actually in this very courthouse  
18 concerning that allegation and the claim against various  
19 defendants made by Mr. Privitello?

20 A. Yes, sir, I am.

21 Q. Were you named as a defendant in that action, sir?

22 A. No, sir, I was not.

23 Q. So, Mr. Kenner, at any point in time did you conspire  
24 with Mr. Constantine to defraud Mr. Privitello with  
25 reference to money that he may have conveyed to

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1 Mr. Constantine for purposes of acquiring an ownership  
2 interest in Eufora?

3 A. No, sir.

4 Q. There's no question that you had developed, if you  
5 will, a relationship with Mr. Constantine where you would  
6 send him money and he would send you money.

7 There would be any number of instances between  
8 the time you first met him to the time where you may have  
9 had a falling out where accounts reflect an exchange of  
10 monies; is that true?

11 A. Yes, sir.

12 Q. Will you give us some idea as to the nature of those  
13 exchange of monies between the two of you during that  
14 period of time, the time you met him and the time there  
15 was the falling out, what was the nature of those  
16 transactions?

17 A. Between Mr. Constantine and I we had a number of  
18 business ventures independent of one another and each one  
19 of them from time-to-time would require cash infusions.

20 And just like I would go to Mr. Constantine from  
21 time-to-time and ask if he could help with short-term  
22 lending, I would go to other individuals as well.

23 I know that Mr. Constantine had come to me on a  
24 number of occasions requesting short-term loans to satisfy  
25 other business obligation he had.

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1 In fact, at times he would ask me if I can  
2 infuse cash into Eufora when Eufora needed some short-term  
3 cash.

4 There were certain periods of times prior to the  
5 Neptune loan being signed and over the period of time from  
6 approximately 2005, 2006, until about 2010, when we were  
7 no longer dealing with one another on a regular basis, the  
8 exchange of cash happened on quite a regular basis.

9 (Continued on next page.)  
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**Kenner - Direct/Haley**

4365

1 Q What happened in 2010 between yourself and  
2 Mr. Constantine?

3 A We had a falling out based on a number of different  
4 business dealings that we had and at that point in time I  
5 believe it was in my best interest that I no longer  
6 communicate with Mr. Constantine.

7 Q At any point in time, sir, did is there develop a  
8 dispute between you and Mr. Constantine concerning  
9 Eufora's reflection of an ownership interest in Eufora and  
10 other matters related to Eufora?

11 Yes or no?

12 A Yes.

13 Q Who is Michael Stolper?

14 A Michael Stolper is a New York attorney that was hired  
15 by Tim Gaarn and CR Gentry with respect to an  
16 investigation they wanted to begin regarding Eufora and  
17 its activities.

18 Q So he was initially by your testimony contacted by CR  
19 Gentry and Tim Gaarn for purposes of legal representation  
20 and/or investigations; is that correct?

21 A Specifically Tim Gaarn had an existing relationship  
22 in New York with an individual who introduced him to  
23 Mr. Stolper, Mr. Hatsamos and Mr. Oliver. And subsequent  
24 to Mr. Gaarn's first communication with those three  
25 gentlemen, he introduced CR Gentry to them as well in or



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1 about March of 2010.

2 Q Did there come a point in time that you became  
3 involved in some sense with what Attorney Stolper was  
4 doing with respect to his engagement by Gaarn and CR  
5 Gentry?

6 A Yes, sir.

7 Q And would you describe what was the nature of your  
8 involvement and the circumstances under which you became  
9 involved?

10 A The communication initially came through Mr. Gaarn  
11 who told me that Mr. Gentry and Mr. Gaarn had initiated an  
12 investigation into the business dealings at Eufora. They  
13 let me know they hired on a consulting basis Mr. Stolper,  
14 Mr. Hatsamos and Mr. Oliver at that time, and they asked  
15 if I would help participate in the exchange of information  
16 which was 100 percent on my behalf by e-mail between the  
17 point of their engagement and approximately June 26th of  
18 2010.

19 Q In what respect, if any, was your assistance provided  
20 to Mr. Stolper beneficial to your hockey player clients?

21 A My participation was specifically for the benefit of  
22 the clients.

23 One of the questions that was trying to be  
24 resolved at that point in time was to make sure that there  
25 was an accurate reflection of ownership interest on the

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1 books and record of Eufora, and based on representations  
2 by Mr. Gentry to me, I proceeded to assist them in any way  
3 I could to make sure any of the prior business  
4 transactions that occurred between my clients and Eufora  
5 were documented through banking transactions so the books  
6 and record as a result of the investigation could properly  
7 reflect what we believed were the investment amounts and  
8 ownership interest in Eufora.

9 Q There's been repeated reference to an e-mail, an  
10 e-mail string wherein Mr. Stolper updated various hockey  
11 player clients and you are cc'd in that e-mail in  
12 connection with the status of that matter and indeed a  
13 lawsuit that was filed.

14 Are you familiar with that e-mail?

15 A Yes, sir, I've seen that in evidence.

16 Q To your knowledge and understanding, was a lawsuit  
17 filed?

18 A Yes, sir, I believe there was a lawsuit in Arizona  
19 filed in late 2010.

20 Q And what is your understanding of the nature of the  
21 lawsuit that was filed?

22 A I believe one of the claims in the lawsuit was based  
23 on trying to make sure that there was an accurate  
24 reflection of the books and records ownership for my  
25 clients in Eufora.

**Kenner - Direct/Haley**

4368

1 Q Do you know what happened with that lawsuit that was  
2 filed in Arizona initially?

3 A It was initially dismissed by the judge based on some  
4 inefficiencies in the original filings.

5 Q There's been allegations, sir, as relates to the  
6 Stolper investigation/lawsuit of what was characterized as  
7 a hostile takeover.

8 Well, is that wholly false, is it true, or what  
9 would be your response to that?

10 A There was an effort on behalf of the group led by  
11 Mr. Stolper, Mr. Hatsamos, Mr. Oliver, Mr. Gentry,  
12 Mr. Gaarn, Mr. Kaiser, and Mr. Berard with my assistance  
13 to acquire the loan if it were deemed a hostile takeover.  
14 Yes, in fact it did happen.

15 Q Tell us about acquiring a loan and what you mean by  
16 those efforts. What are we talking about?

17 A Prior to June 26th of 2010, the effort led by  
18 Mr. Stolper's team were trying to come up with a solution  
19 as to how they would wrangle control of Eufora on a day to  
20 day operation basis away from Mr. Constantine and his  
21 management team.

22 As a result, my participation was frankly to  
23 give them as much information I had or I possessed to help  
24 in their investigation knowing my allegiance was to my  
25 clients at that time.

**Kenner - Direct/Haley**

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1           During that process, one of the recommendations  
2           was that the outstanding loan that Mr. Constantine had put  
3           together with Neptune Capital for operating capital at the  
4           company, one of the ways to take control of the company  
5           would be to buy that lien from Mr. Nerguzian who I  
6           mentioned earlier.

7           At that point I believe Mr. Gentry and perhaps  
8           Mr. Stolper had contacted Mr. Nerguzian and his attorneys  
9           with respect to buying that loan from his company which I  
10          believe was somewhere in the neighborhood of \$3 million at  
11          that point in time.

12          Mr. Stolper and the group of people that were  
13          working with him prior to June 26th, believed that if they  
14          had made based on representations by Mr. Nerguzian and his  
15          attorney, an initial investment of \$250,000, he would sign  
16          an agreement to allow Mr. Stolper's group to acquire the  
17          principal interest in that loan with the payment schedule  
18          to buy out the rest of it in short order.

19          On or about June 26th, I spoke to Mr. Stolper  
20          for the first time after a call that Mr. Gaarn had set up,  
21          and at that point in time Mr. Stolper informed me that  
22          they were in fact trying to buy the loan and would like to  
23          talk to the rest of the AZ Eufora members which was a  
24          group of about 15 individuals, plus or minus.

25          Q     What was the concern? Why did you need to buy the

**Kenner - Direct/Haley**

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1 loan? What was the concern in connection with the  
2 ownership interest held by your hockey player clients?

3 A I think the biggest issue that was told to me  
4 specifically by CR Gentry, was that the company was not  
5 being managed properly and that contracts and agreements  
6 with potential banks such as MetaBank, I think we had  
7 mentioned earlier in this trial, were not being followed  
8 through on a proper basis.

9 I certainly don't recall conversation about the  
10 patents and issues related to the patents that Bill had  
11 alluded to before, that I was the first I heard it in the  
12 courtroom, but, moreover, the ability to process those  
13 licensing deals based on the patents that Eufora held that  
14 Mr. Stolper and his group wanted to acquire that loan from  
15 Mr. Nerguzian so they could in fact control the company.

16 Q As you sit here today, Mr. Kenner, what is your  
17 understanding as to the books and record of Eufora with  
18 respect to the ownership interests in Eufora as acquired  
19 by your hockey player clients?

20 MR. MISKIEWICZ: Objection. May we approach?

21 THE COURT: No. Again, I'll give the  
22 instruction: This goes to Mr. Kenner's state of mind, not  
23 for the truth, whether it is true or not, what his  
24 understanding is, his state of mind. I'll allow it with  
25 that instruction.

**Kenner - Direct/Haley**

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1 Go ahead, Mr. Kenner.

2 A As I sit here today, my understanding is that books  
3 and records, spreadsheets that had been provided to me by  
4 Mr. Gentry as a result of his work at Eufora in 2009 and  
5 2010 reflected what I believed were accurate ownership  
6 interests in the company based on his work in 2009 through  
7 the end of his investigation with Mr. Stolper's group in  
8 2010.

9 And ultimately during the mediations,  
10 negotiations and discussions with Mr. Constantine and his  
11 lawyer, I think they were seeking to just have a final  
12 verification of that and I'm not sure what happened at  
13 that point in time.

14 Q Have you seen those books and records and  
15 spreadsheets, sir, as created by CR Gentry?

16 A Yes, sir, I have.

17 Q How did you acquire those documents initially?

18 MR. MISKIEWICZ: Objection. May we approach?

19 THE COURT: Yes.

20 (Whereupon, at this time the following took  
21 place at the sidebar.)

22 (Continued.)

23

24

25

**Kenner - Direct/Haley**

4372

1 MR. HALEY: If I can make an offer of proof. I  
2 expect that CR Gentry provided me those books and records,  
3 I assume he will say, not to have him introduce or lay a  
4 foundation for the introduction of those books and records  
5 because I don't believe I'd be able to do it through this  
6 witness, but I think it is relevant material that I let  
7 this jury know this was not some sort of event where there  
8 was not some substantiation from his point of view, his  
9 state of mind as to his client's ownership interest in  
10 Eufora.

11 That's my offer.

12 MR. MISKIEWICZ: Then I withdraw the objection.

13 THE COURT: All right.

14 (End of sidebar conference.)

15 (Continued.)  
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**Kenner - Direct/Haley**

4373

1 (Open court.)

2 THE COURT: The Government will withdraw its  
3 objection.

4 THE COURT: Go ahead.

5 Q Mr. Kenner, as relates to the books, records and  
6 spreadsheets created by CR Gentry, did there come a point  
7 in time that you were provided those documents? Yes or  
8 no?

9 A Yes, sir.

10 Q Who provided them to you initially?

11 A Mr. Gentry.

12 Q At the point in time he provided you those documents,  
13 what was your understanding as to his position at Eufora?

14 A By the time he had given me the spreadsheets  
15 reflecting the books and records, I believe Mr. Gentry had  
16 been terminated from Eufora.

17 Q Prior to his termination, what was your understanding  
18 of his position at Eufora?

19 A I believe he was the Chief Executive Officer.

20 Q With reference, sir, to your hockey player clients'  
21 purchases in Eufora, you told us that through Stolper, the  
22 lawsuit was commenced ultimately and was later dismissed,  
23 is that true?

24 A Yes, sir.

25 Q Do you know if the lawsuit was then refiled or



**Kenner - Direct/Haley**

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1 whether any is pending, if you know?

2 A The Arizona lawsuit from the plaintiffs' prospective  
3 was never refiled, but I know subsequent to that  
4 Mr. Stolper and some of the investors which I believe  
5 included Mr. Privitello decided to refile or file a new  
6 lawsuit in New York here in this building with Judge  
7 Feuerstein.

8 Q Do you know the status of that lawsuit?

9 A I believe that lawsuit was stayed or stopped at one  
10 point in time when Mr. Constantine filed for bankruptcy.

11 Q Now, when Mr. Constantine filed for bankruptcy, what,  
12 if any, assistance did you provide to your hockey player  
13 clients to protect their interests in that bankruptcy  
14 proceeding?

15 A After I had received notification of  
16 Mr. Constantine's original bankruptcy filing, I began to  
17 do a lot of legal research on my own as to what could be  
18 done to make sure that investments my clients had made in  
19 Eufora through Mr. Constantine had been properly  
20 documented so as not to allow anything to happen through  
21 this bankruptcy that could adversely affect my clients'  
22 ownership.

23 I actually drafted, I believe, ten lawsuits  
24 known as adverse proceedings for, I believe, ten of my  
25 clients and then one additional one for myself and filed

**Kenner - Direct/Haley**

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1     them against Mr. Constantine's bankruptcy in Arizona, and  
2     placed on the record notification of our desire to be  
3     involved in the bankruptcy proceedings.

4     Q     And in so doing, did you leave out any of your hockey  
5     player clients who had an interest in Eufora?

6     A     I don't believe that any of them that I was still in  
7     contact with were left out of those adverse proceedings.

8     Q     Well, within each of those adverse proceedings, was  
9     there a list of your hockey player clients and their  
10    respective contributions to Eufora detailed within that  
11    adverse proceeding pleading?

12    A     Yes, sir, in each one of them.

13    Q     What level of communication did you have with each of  
14    those hockey player clients concerning that particular  
15    pleading?

16                 Was it telephonic, in person?

17                 Just give us some level of understanding as to  
18    the nature of discussions you had as it relates to that  
19    particular pleading?

20    A     I don't believe any of the communications were in  
21    person at that time because it became a full-time job of  
22    mine to file those adverse proceedings prior to a  
23    deadline. I believe each one of those adverse proceedings  
24    included 24 exhibits and represented about a one-inch  
25    thick legal document, including exhibits that had to be

**Kenner - Direct/Haley**

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1 filed by certain deadlines. All communications were on  
2 the phone with my clients.

3 Q Sir, I'll ask you to take a look at Kenner Exhibit  
4 102 for identification.

5 Do you recognize that document?

6 A Yes, sir. I do.

7 Q And would you simply state what this document is?

8 A This is the adverse proceeding that I filed on behalf  
9 of Glen Murray versus Tommy Constantine's bankruptcy in  
10 Arizona, March 21, 2013.

11 MR. HALEY: Thank you.

12 Q Kindly take a look at documents that have been marked  
13 as Kenner 72. Do you recognize that document?

14 A Yes, I do.

15 Q What is that?

16 A This is a similarly filed adverse proceeding in  
17 Mr. Constantine's bankruptcy on behalf of Darryl Sydor on  
18 March 21, 2015.

19 Q I'm backing up a little bit, Mr. Kenner, but with  
20 reference to Kenner Exhibit 27, would you simply tell us  
21 what this document is?

22 I think just by looking at the first page you'd  
23 be able to tell.

24 A I believe this is the lawsuit that Mr. Stolper filed  
25 on behalf of Theodore Hughes, Ethel Kaiser, Nick

**Kenner - Direct/Haley**

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1 Privitello and Robert Rizzi versus Mr. Constantine here in  
2 the Eastern District of New York on June 3, 2011, in Judge  
3 Feuerstein's.

4 Q And is that the civil lawsuit that I questioned you  
5 about concerning the allegations in paragraph 14 of the  
6 indictment which alleged that you and Constantine  
7 convinced Privitello to convince him to invest in Eufora?

8 A Yes, that's the lawsuit you were referring to.

9 Q Mr. Kenner, I'm going to read you a paragraph in the  
10 indictment with the heading "The Global Settlement Fund."

11 " It was further part of the scheme to defraud  
12 between May of 2009 and February 2010, the defendants  
13 Kenner and Constantine defrauded certain of the investors  
14 to contribute to an entity know as GSF, which Kenner and  
15 Constantine represented to be a legal defense fund.

16 The defendants Kenner and Constantine unlawfully  
17 diverted certain money for unlawful purposes, including  
18 for their personal benefit."

19 You are familiar, are you not, Mr. Kenner, with  
20 the Global Settlement Fund?

21 A Yes, sir, I am.

22 Q Would you tell us how the Global Settlement Fund came  
23 to be created?

24 What occurred early that led -- I'll call it the  
25 creation of the Global Settlement Fund?

**Kenner - Direct/Haley**

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1     A     By mid 2008 when Mr. Harvey and Mr. Jowdy had  
2     terminated all of Mr. Constantine's negotiating rights as  
3     a mediator between the parties that Mr. Jowdy owed tens of  
4     million dollars of dollars at the time, I began to  
5     commence litigation against Mr. Jowdy in multiple  
6     jurisdictions on behalf of myself, my investors and my  
7     clients.

8             By the spring of 2009, I had engaged a law firm  
9     in Washington, D.C., named Akin Gump. At that point in  
10    time they required a \$100,000 retainer just to look into  
11    the matter.

12            After 30 days of work, the law firm told me that  
13    they were ready to engage against Mr. Constantine --  
14    excuse me, Mr. Jowdy, I apologize -- against Mr. Jowdy in  
15    the multiple U.S. jurisdictions and then assist in  
16    acquiring Mexican legal counsel to pursue Mr. Jowdy in  
17    Mexico.

18            They told me at the time they would need a  
19    \$1 million retainer to begin that work, and when they told  
20    me that, I asked would that be all-encompassing to handle  
21    all of the litigation? They said no, that million dollar  
22    retainer would be the initial deposit necessary and on a  
23    monthly basis whatever they drew down at that time which  
24    they anticipated to be \$100,000 and \$200,000 a month for  
25    the multiple litigation efforts and they would need it to

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1 be replenished on a month over month basis.

2 I told Mr. Constantine because he had been  
3 intimately involved with Mr. Jowdy's negotiations for  
4 almost two years at that time, and he told me he thought  
5 those numbers were outrageous, which I didn't disagree  
6 with at the time, and he asked me if he could just have a  
7 few days to consider what other options may be available  
8 to our group of investors that he had been helping to  
9 fight for.

10 Q That conversation you had with Mr. Constantine, where  
11 did that take place, if you recall?

12 A I believe originally I had called him on the phone to  
13 let him know following the text message I sent him that  
14 when he was waiting to hear how much Akin Gump had  
15 required as an ongoing retainer, I had got Akin Gump to  
16 first agree to reduce their initial retainer to \$750,000  
17 which didn't seem like much of a discount at the moment  
18 but again it was simply just a retainer, it wasn't the  
19 full fee.

20 So I sent that text message to Mr. Constantine,  
21 and either he called me or I followed up with a phone call  
22 just to confirm he understood what I was texting him and I  
23 believe I met with him face-to-face at that point in time,  
24 most likely at whatever office he was working out of at  
25 the time.

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1 Q So decisions were made then to hire.

2 What is the name of the law firm?

3 A Akin, A-k-i-n second word Gump, G-u-m-p.

4 THE COURT: Mr. Haley, do you want to take a  
5 break?

6 MR. HALEY: Yes, sir.

7 THE COURT: We'll take an afternoon break.  
8 Don't discuss the case.

9 (Whereupon, at this time the jury exits the  
10 courtroom.)

11 THE COURT: If everyone will be seated.

12 I want to give the jury at the end of the day  
13 today a projection of where we stand so, Mr. Haley, give  
14 me a realistic estimate how much more you have with  
15 Mr. Kenner?

16 MR. HALEY: A well-deserved comment, Judge.

17 I don't envision, your Honor, we'll finish  
18 Mr. Kenner's testimony this afternoon, and there is,  
19 Judge, a matter that counsel did want to discuss with the  
20 Court.

21 There's a tape-recording that was, I know your  
22 Honor is familiar with, created by Mr. Kenner where he had  
23 a conversation with Mr. Constantine with reference to any  
24 number of issues. I would represent to the Court that my  
25 client has listened to that tape-recording this morning

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1 and would be able to authenticate that tape-recording  
2 insofar as being able to testify that, having listened to  
3 the recording, it is as best we recall a true and accurate  
4 reproduction of the conversation had between himself and  
5 Mr. Constantine on the date indicated.

6 That recording does end at some point in time  
7 and I'll leave it up to Mr. LaRusso to address any issues  
8 that may be from his perspective obstacles to its  
9 introduction, but it is my intention to lay the foundation  
10 to introduce it in evidence as a defense exhibit.

11 THE COURT: So you will play it?

12 MR. HALEY: Yes, sir.

13 THE COURT: Do you think you'll be half the day  
14 on Monday?

15 What do you think?

16 MR. HALEY: I don't imagine, Judge, it will be  
17 more than half a day on Monday.

18 THE COURT: So can I confidently tell the jury  
19 Mr. Kenner intends on resting his portion of the case  
20 sometime on Tuesday? Obviously Mr. LaRusso and the  
21 Government goes. It is possible that it will go into  
22 Tuesday then, right?

23 MR. HALEY: Yes.

24 THE COURT: So you are comfortable with that?

25 MR. HALEY: Yes.



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1 THE COURT: And the Government anticipates you  
2 have a week --

3 MR. LARUSSO: Your Honor, we have witnesses  
4 coming in on Monday.

5 THE COURT: Well, that will not happen.

6 MR. LARUSSO: I'm overly optimistic, Judge.  
7 I'll have to make the arrangements.

8 THE COURT: But in terms of the estimate, a  
9 week?

10 MR. LARUSSO: I still am hoping to finish within  
11 a week, Judge. There are two witnesses and they will not  
12 be as long as Mr. Kenner, but the others are relatively  
13 short.

14 I have two other issues we can address now or we  
15 can address at the end of the day.

16 THE COURT: Why don't we address it at the end  
17 of the day.

18 MR. LARUSSO: Definitely will take up the rest  
19 of the week concerning his schedule.

20 THE COURT: Well, I'll say after we finish on  
21 Tuesday, you will take a week.

22 MR. LARUSSO: Yes.

23 MR. HALEY: Your Honor, if I may, I've literally  
24 tried to refrain to interrupt my client's narrative with  
25 the introduction of exhibits.

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1 I spoke with Mr. Miskiewicz. I'm going to give  
2 him exhibits that I would then frankly at the conclusion  
3 of Mr. Kenner's testimony seek to introduce.  
4 Mr. Miskiewicz may speak with me over the weekend -- I'll  
5 not go over exhibit after exhibit and use select areas for  
6 my summation, but I think that might truncate my client's  
7 defense yet preserving his defense.

8 THE COURT: When you go through the charts,  
9 again he's already described generally what led to the  
10 chart. Please don't have him repeat for each chart.  
11 There's 20 charts, so if he's already described what  
12 happened there, he can just say this chart relates to  
13 whatever I testified to. I don't want him to repeat.

14 MR. HALEY: I will not. Thank you, your Honor,  
15 I'm sensitive to that, but those charts as your Honor well  
16 knows came in at the eleventh hour but we'll deal with it.  
17 If it relates to a specific item I may say what relevance  
18 does that have, and he may say the equity transfer  
19 agreement.

20 I will not have him restate that.

21 MR. LARUSSO: The only issue I envision, since  
22 Mr. Haley has chosen to introduce the tape, he told me  
23 during our luncheon recess that that was probably what he  
24 was going to do. I anticipate it coming out during the  
25 Government's cross. I would like to address the Court

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1 regarding a hearing outside the presence of the jury  
2 regarding that tape. We've listened to it. As the Court  
3 knows a portion of it was cut off, but that only deals  
4 with the question of completeness, not alteration.

5 We've listened to it but believe there may have  
6 been or one or two portions that are altered or edited and  
7 wouldn't take more than 20 minutes to address that issue  
8 with the witness before it is addressed with the jury.

9 THE COURT: Let's try to take a short break so  
10 we can have as much time as we can.

11 MR. LARUSSO: Thank you, your Honor.

12 (Continued.)

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1 (Following a recess.)

2 THE COURT: Please be seated.

3 Let's bring in the jury.

4 (Witness resumes the stand.)

5 (Jury enters the courtroom.)

6 THE COURT: Everyone can be seated.

7 Go ahead, Mr. Haley.

8 MR. HALEY: Thank you.

9 BY MR. HALEY (Cont'd):

10 Q. Now, Phil, after that conversation you had with  
11 Tommy Constantine where a decision was made not to hire  
12 the attorneys in Washington as you testified to,  
13 discussions were had between the two of you as to an  
14 alternative.

15 Is that what occurred?

16 A. Yes, sir.

17 Q. And these were jointly held conversations between  
18 yourself and Mr. Constantine, is that correct?

19 A. The conversation occurred between just  
20 Mr. Constantine and I about 36 hours after I had informed  
21 him about the request for the \$750,000 retainer from Akin  
22 Gump.

23 Q. Now, we have seen in evidence, Phil, a letter,  
24 e-mail, I believe, wherein any number of hockey player  
25 clients responded to that e-mail with the phrase,

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1 acknowledged and agreed.

2 Do you know the e-mail I'm referring to?

3 A. Yes, sir.

4 I believe most of them were acknowledged and  
5 approved.

6 Q. Excuse me, correct.

7 Now, would you describe -- now, you created that  
8 e-mail, isn't that true?

9 A. I created it in concert with Mr. Constantine.

10 Q. Preceding that e-mail, what if any conversations were  
11 had between one or more persons that chose to ultimately  
12 contribute to the Global Settlement Fund?

13 A. Each and every one of the Global Settlement Fund  
14 contributors were spoken to either collectively or in part  
15 by myself and/or Mr. Constantine.

16 Each one of the conversations lasted at a  
17 minimum several hours, as there were a myriad of topics to  
18 discuss at that point this time. Although it's been  
19 referenced that Jowdy's litigation was the single and/or  
20 majority purpose for the fund, it certainly was a big  
21 portion of it.

22 But there were a number of other outstanding  
23 issues that were affecting the group as a whole that chose  
24 to contribute to the Global Settlement Fund that we  
25 addressed during those multiple hour conversations either

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1 on the phone or in person with the individuals.

2 Q. When you say we, who are you referring to?

3 A. Mr. Constantine and myself.

4 Q. And if it was a telephone call rather than an  
5 in-person call, it would be a conference call.

6 Is that correct?

7 A. No.

8 In fact, I believe the only phone call that  
9 occurred was actually the very first meeting that we had,  
10 Mr. Constantine and I got together in Los Angeles as a  
11 result of different business purposes and had met with Ron  
12 Richards in or about the first evening and at a house we  
13 were visiting that evening Mr. Constantine got on the  
14 phone with Mattias Norstrom and went through the  
15 presentation to him one-on-one.

16 Although I was present outside walking around  
17 with him as he was talking to Mr. Norstrom --

18 Q. Let me stop you in that regard, Mr. Kenner.

19 Mr. Norstrom is not one of the identified  
20 persons in this indictment, correct?

21 A. He is not.

22 Q. And Mr. Norstrom has not testified in this  
23 proceeding, has he?

24 A. No, sir.

25 Q. Could you confine your answers, sir, to the

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1 conversations with respect to those persons that are  
2 listed in the indictment as relates to those persons  
3 listed in the indictment who actually contributed to GSF.

4 Okay?

5 A. Yes, sir, I apologize.

6 Q. Apology not necessary. I asked the question, it was  
7 very broad based.

8 With reference to those particular individuals  
9 that testified in this court regarding the contribution  
10 they made to the Global Settlement Fund, those  
11 conversations with those people, were they in person or  
12 telephone?

13 A. Each one of them were in person.

14 Q. Where did those conversations take place?

15 Always on a phone, in a different location, if  
16 you can give us any idea?

17 A. Sure, it was various.

18 As an example, Mr. Peca's meeting was in his  
19 home in Columbus, Ohio, Mr. McKee's meeting was in a  
20 restaurant called Chef's in Buffalo, New York, Mr. Sydor's  
21 meeting with me initially was in Dallas, Texas and  
22 subsequently met with Mr. Constantine later on in  
23 Scottsdale, Arizona, Mr. Nash's meeting was in his living  
24 room in Scottsdale, Arizona, Mr. Rucchin flew into  
25 Phoenix, Arizona to meet with us after oversleeping the

**Kenner - Direct/Haley**

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1 initial meeting in Toronto, Canada.

2 Mr. Murray, we met with at Manhattan Beach at  
3 Hennessy's restaurant for lunch. Mr. Ranford I met with  
4 in Hermosa Beach, California.

5 Q. And it's your testimony that these meetings took  
6 place with each of these individuals at the locations you  
7 identified for a duration of maybe -- how long, sir?

8 A. I would say a minimum the conversations lasted two  
9 hours, and for some of them it was between three and four  
10 hours.

11 Q. During these conversations, other than the hockey  
12 player clients, whoever that may have been, yourself and  
13 Mr. Constantine, was anyone else present that you recall?

14 A. Several of their wives were present at these  
15 meetings.

16 But there were no other individuals.

17 Q. At that point in time, had any of these hockey player  
18 clients met Mr. Constantine, if you recall?

19 A. I don't recall specifically.

20 Q. With reference to the retention of lawyers,  
21 Mr. Kenner, there's been testimony as to whether or not  
22 one or more persons had an understanding that lawyers  
23 would be engaged through use of Global Settlement Fund  
24 with reference to litigation involving yourself and  
25 Kristie Myrick.



**Kenner - Direct/Haley**

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1 Do you recall testimony in that regard?

2 A. Yes, sir.

3 Q. Was that litigation, potential litigation --

4 MR. HALEY: Withdrawn.

5 BY MR. HALEY:

6 Q. By the way, was it existing at that point in time,  
7 that litigation?

8 A. Yes, sir, it was.

9 Q. And was that existing litigation mentioned during the  
10 course of this several-hour conversation, if you recall?

11 A. Absolutely, it was paramount to the conversation.

12 Q. One of the witnesses in this trial recalled her name  
13 being mentioned as a person that -- were litigation that  
14 indeed involved the use of GSF funds, is that right?

15 A. At least one, yes.

16 Q. Do you remember who that was?

17 A. Specially Tyson Nash mentioned that and I believe  
18 there were several more times that I heard it.

19 Q. And at least when Tyson Nash recalled that part of  
20 the meeting, that's consistent with your recollection.

21 Is that correct?

22 A. Yes, sir, in each and every one of the meetings.

23 Q. The e-mail that we are referring to, the acknowledged  
24 and approved e-mail, who drafted that e-mail?

25 A. It was primarily drafted by Mr. Constantine.

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1 Q. But you were aware of its contents, correct?

2 A. Yes, sir, I was.

3 I was in agreement with it.

4 Q. And who sent the e-mail out to your hockey player  
5 clients as listed on the e-mail itself?

6 A. I sent out each and every one of them.

7 Q. You received the acknowledge and approved response?

8 A. Yes, from each and every one of them.

9 Q. Did there come a time that Mr. Constantine also  
10 received that e-mail?

11 Did he receive it contemporaneously with your  
12 receipt or sometime thereafter, do you know?

13 A. To the best of my recollection, Mr. Constantine had  
14 required of me to forward each and every one of those  
15 acknowledged and approved e-mail responses from my clients  
16 prior to his utilization of the funds and the Global  
17 Settlement Fund.

18 Q. Now, we know, Phil, that following the e-mail that we  
19 were referring to, in relatively short order moneys  
20 started flowing to the GSF fund from those particular  
21 player clients.

22 Is that true?

23 A. Yes, sir.

24 The order of events was typically we would have  
25 the meeting with the individual and/or his wife. They

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1 would give me permission to wire transfer the funds to the  
2 law office of Ronald Richards' trust account and  
3 immediately following the receipt of funds, I would  
4 forward a copy of that acknowledgment and approved e-mail  
5 to each one of them and receive a receipt shortly  
6 thereafter.

7 Q. Between the time that the e-mail was sent out, as  
8 reflected on the documents already introduced in evidence  
9 and the time that the accepted and approved response was  
10 received, do you have a recollection of any of your hockey  
11 player clients as relates to that e-mail contacting you  
12 for further clarification?

13 A. No, sir.

14 Q. Were you available during that period of time,  
15 Mr. Kenner, for consultation or communication between  
16 those specific hockey player clients or were you in some  
17 way incommunicado?

18 A. I was available 24 hours a day for them.

19 Q. By the way, throughout these events, from the  
20 Hawaiian land development, through Eufora, now into GSF,  
21 what was your lifestyle like in terms of your availability  
22 to your clients?

23 A. I was available 24 hours a day for them.

24 Q. Were there times that there were communications made  
25 between you and your clients that were -- that occurred,

**Kenner - Direct/Haley**

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1 let's say, at 1 a.m. or 2 a.m.?

2 A. On a regular basis.

3 Q. And why was that that we have such late hour  
4 communications?

5 A. There were several reasons, one of which would be  
6 that my clients were professional athletes traveling at  
7 all odd hours of the day.

8 So as an example, if one of their teams finished  
9 playing a game or 11 o'clock or 11:30 at night, they may  
10 head to the airport and catch a 1:30 charter plane back to  
11 the next destination. So between 11:30 at night and 1:30  
12 in the morning that would be awake traveling on a bus to  
13 the airport and it was a time that it was easier for me to  
14 contact them.

15 That would be referenced in evidence I have seen  
16 through text message communication between us where we  
17 would alert one another at certain points in time when we  
18 would be available to catch up and speak.

19 Q. So we have the approved and accepted response to the  
20 e-mail that you sent out.

21 What then transpired as relates to the deposits  
22 into an account and from that point on what occurred with  
23 reference to those deposits into that account, to your  
24 personal knowledge?

25 A. After the receipt of the acknowledged and approved

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1 e-mails, I let each of the clients know by phone that  
2 Mr. Constantine had begun to work on the respective  
3 efforts.

4 Effectively at that point in time,  
5 Mr. Constantine took control of the operations of the  
6 Global Settlement Fund. I think we have seen the  
7 representation of multiple conference calls of which I  
8 participated in each and every one of those for legal  
9 updates, media updates and investment updates relating to  
10 not just Mr. Jowdy, but Ms. Myrick, Mr. Nolan, Mr. Juneau,  
11 Mr. Moreau at the time.

12 Q. There was some testimony, Phil, about a \$22,000 --  
13 \$22,500 expense that went into Ron Richards for payment  
14 through GSF and some dispute between you and  
15 Tommy Constantine concerning that expense.

16 A. Yes, sir.

17 I remember that testimony.

18 Q. Would you just tell us in a summary fashion, sir,  
19 what that was all about.

20 A. After I had traveled with Mr. Constantine and by  
21 myself across the country on multiple occasions to meet  
22 with each and every one of the global settlement  
23 contributors face to face at least once or if not on  
24 multiple times prior to the contributions, I incurred a  
25 significant number of expenses.

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1           In particular, I believe I incurred  
2           approximately \$27,000 in expenses for travel and  
3           entertainment during the four to six weeks that I had  
4           traveled for each and every one of those meetings  
5           including traveling expenses for Mr. Constantine as well.

6           After about two months of the Global Settlement  
7           Fund making disbursements, I told Mr. Constantine that I  
8           had received my credit card statements in the mail. I was  
9           able to reconcile the expenses that I believed were  
10          appropriate with respect to the consummation of the Global  
11          Settlement Fund.

12          At that point in time, I put together a  
13          spreadsheet for him and forwarded it on to Mr. Constantine  
14          for his approval, and there were several expenses on there  
15          that he didn't deem were appropriate, one of which was our  
16          initial meeting I think that we had at a restaurant called  
17          Mr. Chows with two of our lawyers, Mr. Richards and with  
18          Mr. Augustine, but he didn't feel that was appropriate.

19          Q.    So you and he did not agree on your expense account  
20          with reference to what you submitted and what was  
21          ultimately paid out, correct?

22          A.    To the tune of about \$5,000, plus or minus.

23          Q.    And because he had the control over the  
24          disbursements, you only got paid what he determined you  
25          should get paid.

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1                   Isn't that true?

2       A.    Yes, sir, that's correct.

3       Q.    You were present when Mr. Ronald Richards testified  
4       in this courtroom, sir?

5       A.    Yes, sir, I was present.

6       Q.    He had testified as relates to -- it's already in  
7       evidence, Mr. Kenner -- but as relates to RR 1 in  
8       connection with specific payments as related to litigation  
9       involving you and others.

10               Do you recall that, RR 1?

11       A.    Yes, sir, I do.

12       Q.    And to your knowledge does that accurately reflect  
13       your understanding of the payments coming out of the  
14       Global Settlement Fund with reference to the litigation  
15       and how he describe it in his testimony?

16       A.    Yes.

17               When I received a copy of the expenditures after  
18       these dates, they seemed to be appropriate for what the  
19       litigation had taken place relative the representation of  
20       the Global Settlement Fund.

21       Q.    Now, there came a point in time, did there not, where  
22       you actually received a spreadsheet indicating the  
23       incoming contributions to GSF and the outgoing  
24       expenditures.

25               Is that true?

**Kenner - Direct/Haley**

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1 A. Yes, sir.

2 Q. Did you ever withhold that information or document  
3 from any of your hockey player clients upon a request?

4 A. No, sir.

5 In fact, I distributed that to global  
6 settlement's spreadsheet to each of the contributors to  
7 the Global Settlement Fund.

8 Q. And it's fair to state that one or more witnesses in  
9 this trial acknowledged receiving it from you.

10 Is that correct?

11 A. That is correct, and, in fact, I held meetings with  
12 several of them about the use of funds and any questions  
13 they had.

14 I believe Tyson Nash testified to one of our  
15 meetings at AJ's food store outside to discuss the  
16 contents of the global settlement expenditures.

17 Q. Mr. Kenner, did there come a point in time where you  
18 were of the view that Tommy Constantine had  
19 misappropriated or misallocated GSF funds?

20 A. Yes, sir.

21 Q. Do you recall approximately when that occurred?

22 A. I believe there are two occurrences that frustrated  
23 me with respect to the distribution of Global Settlement  
24 Fund.

25 Q. Could you tell us what you are referring to.



**Kenner - Direct/Haley**

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1 A. The first occurrence was in or about November 6th of  
2 2009, when I had an ongoing litigation with Mr. Jowdy in  
3 Mexico to recover not just the outstanding loans that we  
4 had granted him from our Hawaii partners, but all the  
5 other monumental efforts Mr. Constantine had tried to  
6 overcome with respect to mediation and litigation in the  
7 United States at that time.

8 I had requested I believe \$85,000 be sent to one  
9 of our lawyers involved in the case, and when I spoke to  
10 Mr. Constantine on the phone, he told me that those funds  
11 were not available to be sent to Mexico, and if I recall  
12 correctly, either myself alone or myself with John Kaiser  
13 went to Mr. Constantine in person to discuss what had  
14 occurred or what had happened to the Global Settlement  
15 Funds with respect to his inability or his lack of desire  
16 to send the funds to Mexico.

17 I remember a heated conversation about how the  
18 litigation in Mexico was part and parcel to the overall  
19 efforts of the Global Settlement Fund.

20 Q. When you say heated conversation, would you be more  
21 specific?

22 In what sense was it heated?

23 A. Well, I was very frustrated that I had been  
24 shouldering the financial burden in Mexico for quite some  
25 time against Mr. Jowdy.

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1 Starting in or about the summer of 2008, when  
2 Mr. Jowdy, Mr. Harvey and his other legal counsel  
3 terminated both my employment at Diamante and  
4 Mr. Constantine's ongoing negotiations on behalf of our  
5 group, approximately 15 months later, when I had  
6 approached Mr. Constantine about a second wire transfer to  
7 Mexico to continue making payments to the lawyers to  
8 complement what I had been paying them, Mr. Constantine  
9 told me that he disagreed with our efforts in Mexico.

10 He believed there was too much corruption in  
11 Mexico for legal efforts to really hold, and we had a firm  
12 disagreement over that, and ultimately at the end he told  
13 me that although Global Settlement Funds were incredibly  
14 tight at that time, he did eventually agree to wire  
15 transfer the \$85,000 to one of our lawyers with respect to  
16 that ongoing effort in Mexico.

17 Q. You said there was a second instance where there was  
18 a dispute between the two of you concerning the use of GSF  
19 funds.

20 Is that correct?

21 A. Yes, sir.

22 Q. What was that about?

23 A. Sometime after March of 2010, when the lawsuits with  
24 Mr. Jowdy had been terminated in California by  
25 Mr. Richards for a myriad of reasons, we -- I had been

**Kenner - Direct/Haley**

4400

1 spending more time and communication with C.R. Gentry with  
2 respect to the Stolper issues we discussed previously.

3 Mr. Gentry during the global settlement issue  
4 although he was an officer at Eufora was asked by  
5 Mr. Constantine to prepare all of the new operating  
6 agreements for the airplane, for the hangars, for the  
7 newly acquired Eufora shares, and for the two Palms units  
8 that I had funded and decided to contribute to the global  
9 settlement for the benefit of the overall group in  
10 consultation with Mr. Constantine.

11 Mr. Gentry represented to me that those  
12 operating agreements of which I had not seen, that my  
13 contributions were not reflected in those operating  
14 agreements, that he believed that all the capital accounts  
15 that were reflected in those different operating  
16 agreements were inaccurate and not to my favor, or the  
17 favor of my clients.

18 Q. When you say or the favor of your clients, meaning  
19 that such entries were being recorded or not being  
20 recorded?

21 A. From what I understood from Mr. Gentry they were not  
22 being recorded when he represented to me what the  
23 operating agreements reflected for capital account  
24 contributions.

25 Q. That was at least your understanding in connection

**Kenner - Direct/Haley**

4401

1 with what was transpired vis-à-vis the use of Global  
2 Settlement Funds at that time.

3 Is that true?

4 A. Yes, sir.

5 Q. Did you keep that knowledge to yourself?

6 A. No, sir.

7 Q. What did you do?

8 A. At that point in time I was very frustrated because  
9 the ongoing legal efforts in Mexico continued.

10 I was still working on the criminal cases in  
11 Mexico against Mr. Jowdy, and had to then again shoulder  
12 the financial burden of pursuing Mr. Jowdy both in civil  
13 and criminal litigation in Mexico.

14 I contacted each of the clients who had invested  
15 and contributed money to the Global Settlement Fund and  
16 let them know that the Global Settlement Funds had  
17 effectively dried up, and I was now again shouldering the  
18 burden of the financial commitments to the lawyers in  
19 Mexico to pursue Mr. Jowdy.

20 I told them that for two reasons, one was  
21 certainly for notification, and at that point I was  
22 waiting for the -- in or about that time I was waiting for  
23 the spreadsheet from Mr. Richards that I had requested so  
24 I could disseminate it amongst the group.

25 Second, I let them know because there was a real

**Kenner - Direct/Haley**

4402

1 possibility in order to conclude my civil and criminal  
2 actions against Mr. Jowdy on to -- to the collective  
3 benefit of the group, I was going to need to ask them for  
4 additional funds if I couldn't shoulder the hundred  
5 percent financial burden.

6 Q. And though the Global Settlement Fund has a myriad of  
7 purposes, there was a primary purpose, was there not?

8 A. One of the major purposes, not necessarily one I'd  
9 designate as the primary purpose, but one of the major  
10 purposes was to pursue all litigation efforts against  
11 Mr. Jowdy and clean up some of the surrounding business  
12 issues that had been created because of the dissension he  
13 caused amongst the group.

14 Q. When you finally received the spreadsheet reflecting  
15 the disbursements out of the Global Settlement Fund, you  
16 reviewed those disbursements.

17 Is that correct?

18 A. Yes, sir, I did.

19 Q. The e-mail that you wrote to your clients expressing  
20 your view that Tommy Constantine had misappropriated GSF  
21 funds, that went out actually before you received the  
22 detailed list of the disbursements.

23 Is that your testimony?

24 A. I believe in and about that time I had sent out a  
25 number of e-mail updates to my clients to let them know

**Kenner - Direct/Haley**

4403

1 the status of what was going on and that probably  
2 continued through sometime in 2011.

3 THE COURT: It's 4:30.

4 Did you finish that topic?

5 MR. HALEY: Very close, we are going to finish  
6 it real quick Monday morning, Judge, but, yes.

7 I'm very close.

8 THE COURT: Okay.

9 MR. HALEY: But I think it's a good time to  
10 break, Judge.

11 Thank you.

12 THE COURT: In terms of where we stand, I have  
13 spoken to the lawyers, I know my estimates have been off,  
14 but I'm doing the best I can.

15 I believe Mr. Haley will finish completing his  
16 presentation of evidence on behalf of Mr. Kenner by  
17 Tuesday morning, it's my best estimate at this point, and  
18 I anticipate Mr. LaRusso is going to take approximately  
19 one week to present his case.

20 So I said the defense case would be one to two  
21 weeks. It looks like we are closer to the two weeks than  
22 the one week. I know there is one juror that has an issue  
23 next week, juror No. 3, so why don't you stay for a minute  
24 so I can understand that a little more. I want to try to  
25 accommodate that.

4404

1           Again, don't read or listen to anything  
2           regarding the case. Don't discuss the case and we will  
3           reconvene Monday morning at 9:30.

4           Have a good weekend.

5           (Jury leaves the courtroom.)

6           (Juror No. 3 enters the courtroom.)

7           THE COURT: Everyone can be seated.

8           Juror No. 3, you can have a seat. I want to  
9           make sure I understand because obviously you spent a lot  
10          of time on the case I want to try to accommodate you as  
11          best I can.

12          The graduation is next Wednesday in the morning?

13          A JUROR: Yes.

14          THE COURT: You wouldn't be able to start until  
15          2?

16          A JUROR: Yes.

17          THE COURT: She also mentioned this other issue  
18          you have a vacation scheduled for late June.

19          Tell me a little more about that.

20          A JUROR: I have flight plans on the 29th of  
21          June.

22          THE COURT: How long were you expecting to go  
23          away for?

24          A JUROR: About a month.

25          THE COURT: Okay.

4405

1 I know you discussed with her possibly trying to  
2 rearrange that trip.

3 Is that possible, not possible, do you want to  
4 do that? Do you not want to do that? Tell me.

5 A JUROR: Because I have invested time, this is  
6 obviously important to see this through, but I'm  
7 willing --

8 THE COURT: Speak a little louder so they can  
9 hear you.

10 A JUROR: I will incur some expense to change  
11 the tickets.

12 I'm willing to do that, I don't know how much  
13 more time --

14 THE COURT: What's the time frame with which if  
15 you wanted to reschedule, is there a certain time you have  
16 to reschedule on?

17 A JUROR: I could push the plans back by another  
18 week.

19 THE COURT: A week?

20 A JUROR: Yes.

21 THE COURT: Okay.

22 A JUROR: I don't want to make things more  
23 difficult than they need to be.

24 THE COURT: As you said, you invested a lot of  
25 time in the case, especially at this point in the case.



4406

1 In my view as a judge I should make every  
2 accommodation I can to allow a juror to continue to serve  
3 obviously unless it creates other problems for everyone  
4 else.

5 Why don't you hang around for a minute and let  
6 me speak to the lawyers and I'll bring you back in.

7 A JUROR: Okay.

8 THE COURT: Thank you.

9 (Juror No. 3 steps outside.)

10 THE COURT: I didn't understand he's going away  
11 for a month.

12 MR. LARUSSO: I didn't either.

13 THE COURT: I don't think my deputy knew that  
14 either.

15 She was accurate that I guess because he's going  
16 away for a month he's a teacher that he -- if he's going  
17 to reschedule and incur the expense he said July 3rd, my  
18 inclination is to tell him I'm not going to make a  
19 decision now. I guess I'll tell him he's not going to  
20 miss the graduation.

21 In terms of the vacation plans I'll make an  
22 assessment next week, but I can tell you right now given  
23 what I'm hearing and given the history of this case what I  
24 said yesterday would apply that I'm not going to have a  
25 juror who has a time limit in the best case scenario there

4407

1 might be two days of deliberations, three days of  
2 deliberations before he has to take his flight and that's  
3 not sufficient given the length of this case.

4 I'll hear from anybody. I don't think we should  
5 excuse him now, but I'm projecting that I'm going to end  
6 up excusing him on Wednesday or Tuesday.

7 MR. HALEY: I'll take his tickets if he doesn't  
8 use them, Judge.

9 MR. LARUSSO: Judge, when do -- based upon I  
10 guess a lot of uncertainty, when do you think we'll be  
11 giving the case to the jury?

12 I'm trying to figure out how that impacts on his  
13 vacation.

14 THE COURT: If you took a week, if Mr. Haley was  
15 done Tuesday morning and you took a week, that would put  
16 us right there to June 30th where you would be resting  
17 your case.

18 If there was no rebuttal case, there might be  
19 summations on Wednesday, possibly into Thursday, July 1st,  
20 July 2nd, again, this is a best case scenario and they  
21 would begin deliberating on July 2nd, July 3rd is a  
22 Friday.

23 (There was a pause in the proceedings.)

24 THE COURT: I guess other jurors knowing that  
25 I'm dealing with that juror volunteered to Michele I guess

4408

1 one juror's going away July 12th, one juror's going away  
2 July 16th, another juror has some day around July 13th  
3 they have an issue.

4 Those dates better be okay, but, again, it  
5 highlights the fact that we have to try to get this case  
6 done. I think we'll bring him in and tell him I don't  
7 want to make a decision today. He's not going to miss the  
8 graduation next week.

9 But I am -- given his availability is only July  
10 3rd, I want to see where we stand next Tuesday and I'll  
11 make a decision.

12 How's that?

13 MR. LARUSSO: That's fine, Judge.

14 MR. MISKIEWICZ: Yes.

15 MR. HALEY: Yes, Judge.

16 Thank you.

17 THE COURT: Let's bring him in.

18 (Juror No. 3 enters the courtroom.)

19 THE COURT: The bottom line is I'm not going to  
20 make a decision now. I want to wait until next Tuesday  
21 and see where we stand.

22 You are definitely not going to miss the  
23 graduation next Wednesday. Given how much time you spent  
24 on the case, I would certainly accommodate a half a day  
25 request of a juror for that type of event. I'm more

4409

1 concerned about the July 3rd date being the cut-off date.

2 I want to see where we stand on Tuesday and I'll  
3 make a decision regarding that, but I want to emphasize to  
4 you I'm going to be using you as an example for years to  
5 come as a juror because not only have you extended your  
6 jury service beyond my estimate, but the fact you were  
7 willing to incur an expense to move it to July 3rd I think  
8 is exemplary of someone's effort to continue to serve.

9 I want to thank you for your continuing  
10 willingness to serve and I'll let you know Tuesday, but I  
11 want you to know you are not going to miss the graduation.

12 A JUROR: Thank you.

13 I appreciate it.

14 THE COURT: Sure.

15 Have a good weekend.

16 A JUROR: There are a lot of moving parts here,  
17 so thank you.

18 THE COURT: You are welcome.

19 (Juror No. 3 leaves the courtroom.)

20 THE COURT: On this issue regarding the  
21 recording, Mr. LaRusso, I'm okay with you questioning  
22 Mr. Kenner briefly outside the presence of the jury to  
23 address authentication issues.

24 I'm not sure when you should do that, but you  
25 mentioned there's two portions of the tape that you are

4410

1 focused on, is that what you said to me?

2 MR. LARUSSO: I believe all sides agree that the  
3 tape ends after 27 minutes according to estimates.

4 So the conversation clearly continued. I don't  
5 have an answer for you as to how long it continued, but  
6 apparently it was some period of time, and I don't know  
7 the reason why it was terminated. That's issue No. 1.

8 Issue No. 2 is I can't point to one or two of  
9 the portions of the tape that may not be really part of  
10 the recording that should have been on it. Somebody may  
11 have altered it or doctored it and I wanted to ask  
12 Mr. Kenner about those questions. Those are the two areas  
13 I was going to inquire into.

14 And then if there is a problem with his  
15 recollection having listened to the tape and maybe there  
16 may have been some alterations or deletions done to it,  
17 find out what happened to the original recording, who he  
18 may have given it to and see how we end up getting it back  
19 on his phone that -- that's where the tape is actually  
20 coming from I believe according to Mr. Miskiewicz's  
21 proffer made to us the other day.

22 Those are the areas I was going to go into,  
23 Judge.

24 THE COURT: I'm not sure that needs to be  
25 outside the presence of the jury.

4411

1 I guess depending on what his answers will be, I  
2 don't know if Mr. Haley has discussed this with Mr. Kenner  
3 yet. Are you going to isolate the one or two portions,  
4 otherwise how is Mr. Kenner going to know what you are  
5 referring to?

6 MR. LARUSSO: Generally, Judge, and I think I  
7 can.

8 THE COURT: You don't have a transcript.  
9 You would have to cue up whatever portions you  
10 believed were altered for Mr. Kenner to listen to  
11 otherwise it's not going to be productive.

12 MR. LARUSSO: Again, Judge, I don't think it's  
13 going to take too long.

14 I'm going to go right to the point and ask  
15 him -- I guess the first question is listening to the tape  
16 and after having listened to the tape does he believe  
17 there are any alterations or editions to that tape.

18 THE COURT: I thought Mr. Haley said earlier  
19 today his client has listened to the tape and he's  
20 prepared to authenticate it.

21 I don't remember if he addressed whether or not  
22 he would say there were any alterations of that tape, and  
23 also Mr. Haley did say that his client said there was an  
24 additional conversation. I don't think there is a dispute  
25 that it ended.

4412

1 MR. HALEY: Your Honor, sorry to interrupt the  
2 court.

3 Your Honor, I think there is an issue in  
4 connection with whether or not that -- there is an issue,  
5 Judge, as to whether or not that tape recording is a  
6 completely unedited recording of that conversation. There  
7 is an issue as relates to that, and I think the only way  
8 to fully address it, your Honor, from everyone's  
9 perspective is through the testimony of Phil Kenner  
10 outside the presence of the jury.

11 THE COURT: Is he prepared to do that right now?

12 MR. HALEY: I think we are.

13 He listened to it this morning, Judge, yes.

14 THE COURT: Just take the witness stand again,  
15 Mr. Kenner.

16 You understand you are still under oath,  
17 Mr. Kenner.

18 THE WITNESS: Yes, sir.

19 **PHILIP KENNER,**

20 having been previously sworn, resumed the stand  
21 and testified further as follows:

22 THE COURT: You can question, Mr. LaRusso, but  
23 he knows what the issue is.

24 Just have him explain it.

25 MR. LARUSSO: I think that's correct, Judge.

4413

1 There is no need for a full-blown examination.

2 THE COURT: Explain any editing done to the tape  
3 and I'll let Mr. LaRusso follow up.

4 THE WITNESS: Very simply the original recording  
5 of the tape was of the conversation was 56 minutes and 33  
6 seconds long.

7 After I finished the recording I contacted  
8 Mr. Kaiser and let him know that I had communicated with  
9 Mr. Constantine on a spur of the moment encounter at  
10 Home Depot that day, and shortly thereafter I had given  
11 the phone to Mr. Kaiser so he could listen to it and tell  
12 me what he thought of the conversation.

13 Mr. Kaiser assisted in putting that recording on  
14 to a CD and that was probably the last time that I had  
15 listened to the recording until some time or about early  
16 October 2013, about a month before my arrest when I was  
17 with -- I played around the first eight or nine minutes of  
18 it to Greg DeVries.

19 When we were traveling to Mexico.

20 THE COURT: Off the phone or off the disk?

21 THE WITNESS: Off the phone and at that point I  
22 noticed that the recording length was 26 minutes and  
23 change.

24 THE COURT: So on your phone -- that's the  
25 length of it, there is no 56-minute version on your phone?



**Kenner - Direct/LaRusso**

4414

1 THE WITNESS: No, sir.

2 And it was originally recorded on the phone.

3 THE COURT: You want to follow up, Mr. LaRusso?

4 MR. LARUSSO: That takes care of one aspect of  
5 it, Judge, but there is the other one I was mentioning.

6 THE COURT: Sure.

7 DIRECT EXAMINATION

8 BY MR. LARUSSO:

9 Q. Now mentioned actually before you testified you heard  
10 discussions about the fact that when you listened to the  
11 tape recently, you noticed or determined that there may  
12 have been some alterations or deletions or editing to the  
13 portion you actually heard, we are talking about the 27  
14 minutes that's on the tape.

15 Is that correct? You understand my question?

16 A. I will try and answer it.

17 I'm not sure that I represented that in any  
18 conversation that there was a portion that seemed to be  
19 edited from what I could hear on the 27-minute recording  
20 or slightly less than 27 minutes. But what I do recall,  
21 again I only listened to it one time after that until I  
22 had the shorter version of the recording which Greg  
23 DeVries and I listened to about eight minutes when we were  
24 together in Mexico.

25 But from what I recall, there were many more

**Kenner - Direct/LaRusso**

4415

1 references to Mr. Jowdy in the recording originally that  
2 when I listened to it this morning I don't know if I even  
3 heard any references to Mr. Jowdy in the recording.

4 Q. So in the portion that's on the tape you listened to,  
5 it's your recollection that there were -- permit me to say  
6 this -- references to Mr. Jowdy that you remembered being  
7 there but are not on there now that you have listened to  
8 it.

9 Is that correct?

10 A. Yes.

11 In addition there were several references to  
12 Mr. Free and his connection to the FBI as well on the  
13 portion of the tape that I listened to this morning that I  
14 don't recall hearing when I listened to it again this  
15 morning.

16 Q. So those portions that you do not recall hearing  
17 should have been in the selected portion that you heard,  
18 you did not hear them when you listened to it this  
19 morning?

20 A. To the best of my recollection, yes.

21 Q. You recorded this on your iPhone, is that correct?

22 A. Yes, sir.

23 Q. After you recorded it, you just told us you contacted  
24 Mr. Kaiser and you then provided your iPhone to  
25 Mr. Kaiser.

Kenner - Direct/LaRusso

4416

1 Is that right?

2 A. Yes, so he could listen to it.

3 Q. Are you familiar with the operation of the iPhone in  
4 recording conversations?

5 A. Not in particular.

6 Q. You knew how to record the conversation?

7 A. I hit the record button.

8 Q. Are you aware of the fact you can alter the recording  
9 by deleting portions manually on the phone?

10 A. I'm not aware of that.

11 Q. But you are aware of the fact that when you got the  
12 phone back, there was approximately 30 minutes missing  
13 that you remember having been recorded.

14 Is that correct?

15 A. Yes, but it didn't -- I wasn't aware of that right  
16 away.

17 I think the next time I went to that audio  
18 recording file and I may have found it by just dumb luck  
19 when I was with Mr. DeVries in Mexico in and about early  
20 October 2013.

21 Q. By the way, who returned the phone to you?

22 A. Mr. Kaiser.

23 Q. From the time he returned it to you to the time you  
24 are now saying you listened to it with Mr. DeVries, you  
25 didn't, yourself, do anything to that recording nor did

Kenner - Direct/LaRusso

4417

1 you turn the phone over for somebody else to do anything  
2 to that recording.

3 Is that correct?

4 A. That is correct.

5 Q. So that the portions that were removed had to have  
6 been done from the time you gave the phone to Mr. Kaiser  
7 to the time it was returned to you.

8 Is that a fair statement?

9 A. All I know is that when I gave it to Mr. Kaiser to  
10 listen to it was a 56 minute and 33 second recording.

11 The next time I really referenced that voice  
12 message -- excuse me -- that recording was when I was with  
13 Mr. DeVries in Mexico. We listened to about seven or  
14 eight minutes of it and then we had to leave to go meet  
15 with our attorneys in Mexico.

16 Q. Do you remember when this recording was made?

17 A. It would have been made in or around August of 2010.

18 Q. That would have been just prior to the -- I guess it  
19 would be the conference that was being called for the four  
20 shareholders.

21 Is that correct?

22 A. Yes, because I think I recall this morning hearing  
23 Mr. Constantine reference that we should have a meeting of  
24 all the shareholders in that recording I listened to this  
25 morning.

**Kenner - Direct/LaRusso**

4418

1 Q. I'm going to ask you just to tell us at this time  
2 when you were making the recording, who was -- what was  
3 your relationship with Mr. Constantine and Mr. Kaiser?

4 We had been hearing how people changed sides  
5 over the course of years, what was it at or about the time  
6 of this recording?

7 MR. MISKIEWICZ: Objection.

8 THE COURT: I don't want to get into that now.  
9 This is really just to --

10 MR. LARUSSO: There is one other question,  
11 Judge, the other relevancy, so you know, I believe  
12 Mr. Kenner may be aware of other efforts that Mr. Kaiser  
13 has done to doctor evidence.

14 I want to see if he was aware of it.

15 THE COURT: Go ahead.

16 You can answer that question. Are you aware of  
17 any other evidence by Mr. Kaiser to doctor evidence?

18 THE WITNESS: Yes, sir.

19 THE COURT: What would that be?

20 THE WITNESS: After I was arrested I received  
21 documents that I am aware that Mr. Kaiser either forged or  
22 copied my names on to agreements allegedly between  
23 Mr. Kaiser and I.

24 BY MR. LARUSSO:

25 Q. What was the substance of the document that he forged

**Kenner - Cross/Miskiewicz**

4419

1 your name on?

2 A. There were two documents actually.

3 One was dated in I believe July 2006 and the  
4 second was dated in February of 2008. They were allegedly  
5 loan guarantee agreements that Mr. Kaiser then was seeking  
6 to acquire my \$100 million equity interest in the  
7 Cabo San Lucas property for loans that -- and guarantees  
8 that never existed.

9 Q. And you knew nothing about these documents at all?

10 A. Not until after I was arrested.

11 Q. Have you seen those documents?

12 A. Yes, sir, I have.

13 Q. If we need to we can produce those if the court finds  
14 it necessary.

15 A. Yes, sir.

16 Q. Thank you.

17 THE COURT: Do you have any questions?

18 MR. MISKIEWICZ: Just want to clarify make sure  
19 I understand.

20 CROSS-EXAMINATION

21 BY MR. MISKIEWICZ:

22 Q. Within the 26 or 27 minute period of time, you are  
23 saying you don't recall hearing references to Jowdy or  
24 Louie Free.

25 Do you know whether or not those references

**Kenner - Cross/Miskiewicz**

4420

1 occurred in the first 26 or 27 minutes of your  
2 conversation with Mr. Kaiser or could it have happened  
3 after the 26 or 27 minutes when the tape cuts off?

4 A. My conversation was with Mr. Constantine, not  
5 Mr. Kaiser.

6 Q. Okay.

7 Thank you.

8 A. Just for the record, and we -- I am a hundred percent  
9 sure that there was references to Mr. Jowdy and Mr. Free  
10 during those portions.

11 THE COURT: His question was whether or not you  
12 know as you sit here today from your memory whether or not  
13 the references to Mr. Free and Mr. Jowdy were in the 26 or  
14 27 minutes that you heard today or were they part of the  
15 30 minutes that no longer exist?

16 Do you know where those discussions took place  
17 in the recording? You understand the question?

18 THE WITNESS: Yes, sir.

19 THE COURT: Okay.

20 THE WITNESS: I'm a hundred percent certain that  
21 the references that I did not hear this morning in the 26  
22 minutes and change were referencing Mr. Free and  
23 Mr. Jowdy.

24 The recording appears to be the first half of  
25 our conversation. I'm not sure why the second half isn't

**Kenner - Cross/Haley**

4421

1 present, but we certainly discussed Mr. Jowdy -- excuse  
2 me -- Mr. Constantine certainly discussed Mr. Jowdy and  
3 Mr. Free at --

4 THE COURT: You misunderstood his question and  
5 my attempt to clarify his question --

6 MR. HALEY: May I?

7 THE COURT: Go ahead.

8 THE WITNESS: I'm sorry, your Honor.

9 THE COURT: That's okay.

10 CROSS-EXAMINATION

11 BY MR. HALEY:

12 Q. The question of the 27 minutes we are speaking of,  
13 you heard that conversation this morning, is that correct?

14 A. That is correct.

15 Q. And with reference to mentioning either Ken Jowdy  
16 and/or Louis free, was that made within that 26-minute  
17 portion of the conversation, 27-minute portion of the  
18 conversation you listened to this morning?

19 A. Originally, yes, it was.

20 Q. Okay.

21 THE WITNESS: Sorry, I misunderstood your Honor  
22 originally.

23 THE COURT: Your recollection you believe it  
24 should have been within that 26-minute portion rather than  
25 in the later portion that we no longer have?



**Kenner - Cross/Miskiewicz**

4422

1 THE WITNESS: Yes, sir.

2 CROSS-EXAMINATION

3 BY MR. MISKIEWICZ:

4 Q. If we were to play the tape now and hear, as I'm  
5 going to for this hypothetical suggest to you that at one  
6 minute and 39 seconds you do -- or actually  
7 Mr. Constantine does, in fact, talk about Jowdy and you at  
8 the time stamp one minute 39 seconds.

9 Did you just not hear it?

10 A. No, I would believe that to be true.

11 What I was referring to and I apologize was I  
12 believe there were many more references to Mr. Jowdy and  
13 to Mr. Free in the first half of our conversation that I  
14 did not hear on that tape this morning.

15 Q. Is there a particular location in the conversation  
16 where you feel like the conversation cuts in and out?

17 In other words, logically what you say and what  
18 Mr. Constantine says doesn't match, did you hear something  
19 like that?

20 A. Well, I recalled -- the reason I recalled it was  
21 because my son was with me that morning when we were at  
22 Home Depot and I had to sent my eight year old away from  
23 us to kind of wander the halls of Home Depot and after 30  
24 minutes or so my son came back and I recall prior to him  
25 coming back to make sure I was still there I was very

**Kenner - Cross/Miskiewicz**

4423

1       uneasy about the representations about Mr. Free's  
2       involvement and what could happen with Mr. Free  
3       representing Mr. Jowdy.

4               And I did not hear that this morning, but I know  
5       it occurred prior to my son coming back halfway through  
6       the conversation.

7       Q.    So your testimony under oath is you believe that the  
8       26 minutes that exists is incomplete, that pieces have  
9       been cut out of it.

10           Is that what you are saying?

11       A.   I'm saying I believe it's incomplete, yes, sir.

12       Q.   It's incomplete?

13       A.   Yes, sir.

14       Q.   When you say incomplete, not because your memory is  
15       faulty, but because you are certain that those 26 minutes  
16       had been altered.

17           Is that your testimony?

18       A.   I believe it's not the accurate conversation I had --

19       Q.   That's not my question.

20           THE COURT:  We all know it's incomplete because  
21       there are 30 minutes missing.

22           His question is whether or not you are certain  
23       that the 26 minutes that we do have has material missing  
24       from that 26 minutes, that's the question.

25           THE WITNESS:  Yes, sir.

**Kenner - Redirect/LaRusso**

4424

1 THE COURT: Okay.

2 MR. LARUSSO: Judge, may I ask one more  
3 question, this may be some help.

4 REDIRECT-EXAMINATION

5 BY MR. LARUSSO:

6 Q. There is in the tape reference to the getaway driver  
7 and the bank robber.

8 Remember that portion?

9 A. Yes, sir, I do.

10 Q. And there is some preliminary remarks before those  
11 comments are made.

12 In your recollection of this conversation, would  
13 the removal of words such as Mr. Jowdy change the meaning  
14 of those words in the conversation?

15 MR. MISKIEWICZ: Objection.

16 MR. LARUSSO: Maybe I'll rephrase it.

17 MR. HALEY: I would object as well, I guess.

18 BY MR. LARUSSO:

19 Q. You say that there were the names Mr. Jowdy, Mr. Free  
20 were removed or as far as you recall from this portion the  
21 27 minutes, is that correct?

22 A. Yes.

23 Q. And you recall the conversation where there was a  
24 discussion about the getaway driver?

25 A. Yes, sir, I do.

**Kenner - Redirect/LaRusso**

4425

1 Q. Could any of those -- that portion be where  
2 Mr. Jowdy's name may have been removed, to your  
3 recollection of the conversation?

4 A. Yes, sir.

5 Q. Explain.

6 A. Well, I remember the reference to the bank robber and  
7 the getaway car and Mr. Constantine was trying to make a  
8 reference to Mr. Jowdy, either being the bank robber or  
9 driving the getaway car.

10 And I couldn't follow his analogy at the time,  
11 which was somewhat common when Mr. Constantine was trying  
12 to make analogies for me to try to explain situations that  
13 may be similar.

14 Q. I know what you mean.

15 A. I recall him trying to reference a bank robber and a  
16 getaway car and Mr. Jowdy and the money we had been  
17 seeking when we were working together, and that's not what  
18 I heard this morning.

19 Q. Had Mr. Constantine ever used those phrases before in  
20 conversations with you?

21 A. About Mr. Jowdy on a regular basis.

22 Q. How would he describe Mr. Jowdy in other occasions  
23 other than this one?

24 A. Certainly with respect to the frauds related to our  
25 airplanes, the loans he had taken from our clients, the

**Kenner - Recross/Miskiewicz**

4426

1 \$3 million loan he took against the property in North  
2 Baja, the embezzlement of the funds out of the Diamante  
3 Cabo San Lucas project for the first three and a half  
4 years.

5 He referred to all of those events as Jowdy  
6 being a bank robber and he referred to that phrase on many  
7 of the global settlement conference calls prior to the  
8 filing of the litigation against Mr. Jowdy in California  
9 and certainly subsequent to the filing of the litigation.

10 Q. And in this context, did he ever refer to you in any  
11 way?

12 A. As a bank robber?

13 Q. Yes.

14 A. Not that I know of.

15 Q. How about the getaway car?

16 A. Not that I'm aware of.

17 MR. MISKIEWICZ: Do you have any questions?

18 MR. LARUSSO: Go ahead.

19 RECROSS-EXAMINATION

20 BY MR. MISKIEWICZ:

21 Q. When did you give this iPhone to Mr. Kaiser to  
22 record?

23 A. It was some period of time shortly after I made the  
24 Home Depot recording.

25 Q. And when was that?

**Kenner - Recross/Miskiewicz**

4427

1 A. I don't recall, specifically.

2 Q. You were asked some questions about the Stolper  
3 lawsuit, with respect to the Stolper lawsuit when was it,  
4 using the Stolper lawsuit as a reference point, was it  
5 before, was it after?

6 A. It was from my best recollection, it was before the  
7 Stolper lawsuit was filed.

8 Q. Was it in 2009, 2010, 2011?

9 When was it?

10 A. It would have been in 2010, and I believe it was  
11 prior to the shareholder meeting.

12 Q. Which shareholder meeting?

13 A. The shareholder meeting that Mr. Constantine had  
14 e-mailed the people from Eufora and I believe there was  
15 testimony that Mr. Nash and Mr. Berard were present at  
16 that shareholder meeting and Mr. Constantine had hired  
17 some private security to refused to allow myself and  
18 Mr. Kaiser in the building that day.

19 Q. Was that -- I think there was testimony about that  
20 being sometime -- or maybe there was a reference to that  
21 being in July of 2010?

22 A. I don't recall.

23 Q. So was it before or after that?

24 A. I believe it was before that, to the best of my  
25 recollection.

4428

1 Q. So whatever the testimony was, you are saying that  
2 you are pretty sure that this occurred or you gave the  
3 phone to Mr. Kaiser prior to that shareholder meeting or  
4 you made the recording prior to that shareholder meeting?

5 A. I don't recall the order of events as I sit here  
6 today.

7 MR. MISKIEWICZ: All right.

8 Thank you.

9 MR. LARUSSO: Your Honor, this may be of some  
10 help, if I could.

11 My client gave this to me the other day when we  
12 were discussing it that's where why I raised the issue.  
13 It's an e-mail he received from a reporter her name is  
14 Katie Benner, it was received March 15, 2012, and I can  
15 read it into the record.

16 What it says is she had listened to the tape, I  
17 don't know what tape she listened to and she was alluding  
18 to those two phrases, bank robber and getaway and she  
19 actually says that Mr. Constantine used to use those  
20 phrases in the past when referring to Jowdy and Kenner.

21 This is not a doctored e-mail. This kind of  
22 shows you that the use of the phrases getaway driver and  
23 bank robber were in reference in part to Mr. Jowdy, and  
24 that's what raised my concern.

25 May I hand this up to the court and I'll get a

1 copy to the government?

2 THE COURT: That's fine.

3 MR. LARUSSO: I have not spoken to Katie Benner,  
4 Judge.

5 THE COURT: Let me ask you this last question.

6 On the recording itself, are you able to point  
7 to particular instances -- forget about what phrases he  
8 uses, but in listening to the recording yourself, in other  
9 words if I were to listen to the recording can you tell me  
10 which portions you think just from listening to the  
11 recording sound like Mr. Miskiewicz suggested that there  
12 is a cut off or something missing or the conversation  
13 doesn't flow?

14 Or there is nothing specifically that you would  
15 point to?

16 MR. LARUSSO: I personally, Judge, and I have  
17 listened to it a long time back, I cannot.

18 THE COURT: I'm wondering whether I should  
19 listen to the tape or not, but that sounds useless.

20 MR. OLIVERAS: Early on I heard something that  
21 was hard to delineate if it was the beeps from the store  
22 or if it was just -- seemed like an unnatural break at  
23 times, but it was so close but that was my issue and I  
24 think I put that in an affidavit for this motion.

25 THE COURT: Okay.



4430

1 MR. MISKIEWICZ: Your Honor, we do have a copy  
2 if the court wants --

3 THE COURT: Give me a copy, so I can listen to  
4 it.

5 Does the government have anything further to say  
6 on this issue at this point?

7 MR. MISKIEWICZ: No.

8 MR. LARUSSO: Your Honor, do you want me to  
9 contact that reporter to learn a little bit more about  
10 what she is referring to?

11 THE COURT: No.

12 MR. LARUSSO: Okay.

13 THE COURT: On that issue, that really doesn't  
14 go directly to authenticity.

15 It's pretty attenuated. I understand why you  
16 may think it's important and why that may have raised your  
17 concern that there was a deletion, but that would be  
18 really up to the jury on that sole point. To the extent  
19 the government's going to authenticate it from Mr. Kenner,  
20 Mr. Kenner is expressing the view he believes it's  
21 doctored.

22 What's your response to that?

23 MR. MISKIEWICZ: We will offer it on rebuttal  
24 through an expert witness who will evaluate it and testify  
25 as to its authenticity.

4431

1 That's the best we can do right now.

2 THE COURT: Okay.

3 And, Mr. Haley, you said you were going to play  
4 it in direct, but if your --

5 MR. HALEY: No, I will not, your Honor.

6 THE COURT: Okay.

7 MR. HALEY: We flushed out the issues and I  
8 think they needed to be flushed out.

9 And the record speaks for itself.

10 THE COURT: All right.

11 It will be part of the government's rebuttal  
12 case potentially, then.

13 MR. LARUSSO: Thank you, very much.

14 THE COURT: I'll see you Monday morning.

15 Have a good weekend.

16 (The trial was adjourned until Monday, June  
17 22nd, at 9:30 a.m.)

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